United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

745

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,270

Ernest S. Borum, Appellant,

v.

United States of America, Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HOWARD C. WESTWOOD
701 Union Trust Building
Washington, D.C. 20005

Attorney for Appellant
(By Appointment of This Court)

Of Counsel:

T. ROGNALD DANKMEYER, JR.

COVINGTON & BURLING

701 Union Trust Building
Washington, D. C. 20005

STATEMENT OF QUESTIONS PRESENTED

1. Was appellant deprived of his constitutional right to counsel when he was placed in a police lineup in the absence of his attorney even though the police were then focusing their investigation on him and even though his attorney had asked to be present at the lineup?

2. Can appellant's fingerprints taken in a proceeding under the Youth Corrections Act be used to support an arrest warrant for a subsequent crime when appellant's conviction under the prior proceeding was formally "set aside" and appellant was "unconditionally discharged"?

3. In a rape case is it reversible error for the trial judge to permit the jury to treat as corroborative evidence the presence of spermatozoa in the vagina of the complaining witness when that witness was married and living with her husband?

4. Did a supplemental sentencing proceeding, held five days after the original imposition of sentence, subject appellant to unconstitutional double jeopardy where the effect was to increase the term of his imprisonment?

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JURISDICTIONAL STATEMENT

On August 16, 1965 appellant was indicted in the United States District Court for the District of Columbia on two counts of housebreaking, two counts of robbery, three counts of assault with a dangerous weapon, and one count of rape.

On May 12, 1966 appellant was convicted on all counts of the above indictment except one count of housebreaking and one count of robbery. On June 10, 1966 appellant was sentenced to a number of concurrent prison terms, the longest of which was five to twenty years.

Timely notice of appeal was filed on behalf of appellant. On June 15, 1966 the District Court granted appellant's motion to proceed on appeal in forma pauperis.

The District Court had jurisdiction pursuant to the Act of February 27, 1877, ch. 69, § 2, 19 Stat. 253, D.C. Code § 11-306 (1961); and the Act of December 23, 1963, 77 Stat. 482, D.C. Code § 11-521 (Supp. 1966). This Court has jurisdiction of the appeal pursuant to the Act of June 25, 1948, ch. 646, 62 Stat. 929, 930, as amended 28 U.S.C. §§ 1291, 1294 (1966).

STATEMENT OF THE CASE

On June 14, 1965 at about 11:30 a.m. District of Columbia police received a complaint from Mrs. Geneva Clarke, relating to the acts of a Negro male which had just occurred at 2308 Naylor Road, Southeast in the District.

In the course of the police investigation of the premises which immediately followed the complaints, certain objects were taken for fingerprint examination. Fingerprints were found on two objects, which, according to subsequent police testimony, were taken at this time. (Tr. 97, 149) These fingerprints were compared to appellant's fingerprints on file from a prior arrest for a crime in 1960 for which appellant had been sentenced under the Youth Corrections Act (Tr. 136) and had been unconditionally released from his parole on March 18, 1964. The police concluded that the two sets of fingerprints were identical and as a result of this conclusion, a warrant was issued for appellant's arrest. (Tr. 123, 136)

On July 6, 1965, appellant, accompanied by his attorney, Mrs. Jean F. Dwyer, surrendered to the police. At this time Mrs. Dwyer requested that a police officer telephone her the next morning before appellant was placed

in a lineup so that she could be present, and she gave the officer her card. (Tr. 263-267, 306-308)

The next morning, without telephoning Mrs. Dwyer and without her being present, the police placed appellant in a lineup. (Tr. 109, 265)

The trial began on May 9, 1966. Mrs. Lucy Wilson, who resided at the house in question, testified that on the morning of June 14, 1965, when she entered the house a man struck her on the head (Tr. 41), and that subsequently the man hit her across the face a number of times with a pistol. (Tr. 42) She testified that she had not gotten a good look at the assailant. (Tr. 41)

Ralph Jennings testified that at 11:00 a.m. on the same morning he stopped at the house in question to pick up some laundry. (Tr. 16-17) When he entered, he was accosted by a Negro male holding a pistol (Tr. 18), who took $300 from him and tied him up. (Tr. 21-22) Mr. Jennings testified that he had attended a lineup but had been unable to identify any of the individuals in the lineup as the assailant, and that he was still unable to identify the assailant. (Tr. 26-27)

Mrs. Clarke, who resided next to the house in question, testified that on the same morning she heard moaning coming from the adjacent house, and that she went there to see if Mrs. Wilson needed help. She was confronted

with a Negro male who was standing over Mrs. Wilson with a pistol in his hand. (Tr. 37) He forced Mrs. Clarke to undress (Tr. 38) and to have intercourse with him and then he tied her up. (Tr. 48-49) Mrs. Clarke testified that appellant was the assailant (Tr. 37-38), and that she had identified him at a prior lineup. (Tr. 66)

The Government introduced expert testimony that spermatozoa were found in Mrs. Clarke's vagina just after the alleged rape occurred. (Tr. 77-85) On cross-examination, the Government's expert stated that the spermatozoa could have been deposited up to 72 hours prior to its discovery. (Tr. 87) At the time Mrs. Clarke was married and living with her husband. (Tr. 88)

Two police officers testified that an envelope and a newspaper were found at the house in question on June 14, 1965. (Tr. 97, 149) The Government presented expert testimony that fingerprints found on those objects matched those taken from appellant at the time of his arrest in this case. (Tr. 142-143, 151-160)

Called by the defense, Roswell Whitmyer and Charles Green testified that on June 14, 1965 from about 10:30 a.m. to 2:30 p.m., appellant was with them working on his automobile at a garage in downtown Washington. (Tr. 177-179, 214-216)

Edward Jacob Parknow, who operated the garage, testified that Messrs. Whitmyer and Green and appellant had worked on appellant's automobile at his garage one day around June 14, 1965, but he could not recall the exact date. (Tr. 231-232)

Appellant took the stand and testified that he had spent from 10:30 a.m. to late afternoon on June 14, 1965, working on his automobile with Messrs. Whitmyer and Green at Mr. Parknow's garage. (Tr. 260-263) Appellant also testified that when he surrendered himself on July 6, 1965 his attorney, in his presence, told Detective Wolfgang that she wished to be present at the lineup, asked him to contact her before it was held and gave him her card. (Tr. 267) Appellant further testified that he wanted his attorney to be present at the lineup to assure that any identification would be a fair one and because Detective Wolfgang's conduct led him to believe that the lineup would not be conducted fairly. He also testified that Detective Wolfgang insisted on placing him in a particular position in the lineup. (Tr. 267-271)

Detective Wolfgang testified that he did not recall any specific conversation with appellant in connection with the lineup and that he did not insist on placing him in a particular position. (Tr. 111-113) He also testified first

that he did not recall whether Mrs. Dwyer had asked him to notify her of the time of the lineup (Tr. 109); later, he testified that she had discussed a lineup with Detective Bonoccorsy and given her card to him. (Tr. 307)

Judge Corcoran granted appellant's motion for acquittal on the count charging robbery of Mrs. Wilson for lack of evidence and dismissed one of the two housebreaking counts because of the Government's prior agreement to elect. (Tr. 170-174) In charging the jurors as to the evidence they might consider corroborative on the rape count, Judge Corcoran included the testimony which established that spermatozoa were found in Mrs. Clarke's vagina. (Tr. 411) The jury returned a verdict of guilty on the six remaining counts.

On June 10, 1966, Judge Corcoran sentenced appellant to a number of concurrent terms, the longest of which was five to twenty years. At this time, Judge Corcoran made no mention of the relationship of the sentence in this case to the sentences arising from two other Federal convictions.

Subsequent to the imposition of sentence appellant was taken to the District of Columbia Jail. On June 15, 1966 Judge Corcoran ordered appellant brought back from the District of Columbia Jail to the District Court. The Judge then stated,

over the objection of appellant's attorney, that the sentence in this case was to be consecutive to the sentences in the other two Federal convictions.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Fifth Amendment to the Constitution of the United States:

> "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

18 U.S.C. § 3568 (1964):

> "The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence . . ..
>
> "If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.
>
> "No sentence shall prescribe any other method of computing the term."

Note: The Bail Reform Act of 1966, Public Law 89-465, 80 Stat. 214, 217 (Approved June 22, 1966) amended 18 U.S.C. § 3568 (1964); this amendment was not effective at the time of sentence in this case.

18 U.S.C. § 5021(a) (1964):

> "Upon the unconditional discharge by the Division of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Division shall issue to the youth offender a certificate to that effect."

Fed. R. Crim. P. 35:

> "The court may correct any illegal sentence at any time . . .."

Fed. R. Crim. P. 52(b):

> "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF POINTS

1. Appellant was deprived of his constitutional right to counsel when he was placed in a police lineup in the absence of his attorney because the police were then focusing their investigation on him, the lineup was a critical stage in the criminal proceeding, and his attorney had asked to be present at the lineup.

2. Appellant's fingerprints taken in a proceeding which led to conviction and sentence under the Youth Corrections Act could not properly be used to support an arrest warrant for a subsequent crime because the prior conviction had been set aside pursuant to the provisions of that Act.

3. In a rape case the trial judge should not have permitted the jury to treat as corroborative evidence the presence of spermatozoa in the vagina of the complaining witness when that witness was married and living with her husband.

4. The supplemental sentencing proceeding, held five days after the original imposition of sentence, which had the effect of increasing appellant's term of imprisonment, subjected appellant to unconstitutional double jeopardy.

SUMMARY OF ARGUMENT

I. On July 6, 1965 when appellant surrendered to the police, his attorney told a police officer that she wished to be present at the lineup, asked that she be notified of its time, and gave her card to the police officer. The next morning, without notice to appellant's attorney and without her being present, the police placed appellant in a lineup, and he was identified by one of the complaining witnesses. This witness identified appellant at trial and stated that she had also identified him at the lineup.

We contend that in these circumstances appellant was deprived of his constitutional right to counsel. Appellant's right to counsel attached prior to the lineup, because

the police investigation had focused on him as evidenced by the issuance of an arrest warrant based on a finger-print comparison placing him at the scene of the crimes. And once the right to counsel had attached, it extended to the lineup since the latter was a critical stage in the criminal proceedings.

The foregoing principle follows from the Supreme Court's decision in Miranda. The rationale of Miranda -- that the opportunity for police overreaching gives rise to the need for the assistance of counsel at critical stages -- applies to lineups as well as to interrogations. In Miranda the Supreme Court held that the presence of counsel at an interrogation would help prevent unfair procedures and provide the accused with a witness to any unfair procedures. Counsel can and should provide the same protection to an accused at a lineup.

Even if this Court should not adopt the general rule that the assistance of counsel is required at a lineup after the investigation has focused on the accused, the particular facts of this case -- the request by appellant's attorney, the lack of any rejection of the request, and the holding of the lineup in the absence of the attorney -- require a finding that appellant was entitled to have his attorney present at the lineup in question here.

II. Appellant had been convicted for other crimes in 1960 and sentenced under the Youth Corrections Act. He had fulfilled the terms of his committal before the expiration of the maximum sentence; in accordance with the Act, he was unconditionally discharged, and his conviction was set aside.

His fingerprints had been taken as part of the proceedings connected with his 1960 arrest and conviction. During the investigation in 1965 of the crimes involved in this case, the police compared appellant's 1960 fingerprints with those found at the scene of the instant crimes. On the basis of this comparison a warrant was issued for appellant's arrest, and he was arrested pursuant to that warrant.

We contend that the deletion of the 1960 conviction barred the subsequent use against the youth offender of the fingerprints taken in connection with the 1960 conviction. The purpose of the Youth Corrections Act, to encourage the rehabilitation of the youth offender, requires this result. A major inducement to this rehabilitation process contemplated by the Act is the setting aside of the conviction. If the expunging of the conviction is to be an effective inducement, it must foreclose the future use of the matters incident to the conviction as well as the conviction itself.

Because the use of the 1960 fingerprints to support an arrest warrant was improper, the subsequent arrest was accordingly illegal. Hence, fingerprints taken in 1965 at the time of this illegal arrest should not have been admitted at trial.

III. The trial judge permitted the jury to treat as corroborative evidence on the rape count the presence of spermatozoa in the vagina of the complaining witness. Since, however, the witness was married and living with her husband, the presence of spermatozoa was just as consistent with the occurrence of intercourse with her husband as it was with intercourse with appellant. Accordingly, this evidence could not be considered as corroborative of rape.

IV. At the time of the trial below, appellant was serving prior sentences for other Federal convictions. The trial judge in imposing sentence in this case did not state whether the sentence in this case was to run concurrently with or consecutively to the sentences in these prior Federal cases. Under established judicial rule this failure to so state is held to impose a sentence running concurrently with the prior Federal sentences.

Five days after the original imposition of sentence, the trial judge had appellant brought from the District of Columbia Jail to the courthouse and stated that the sentence

in this case was to run consecutively to the prior Federal sentences. This action by the judge had the effect of increasing appellant's term of imprisonment. Since appellant had already entered upon service of his sentence in this case, this increase in his term of imprisonment constituted double jeopardy which applies to a second sentence, as well as to a second trial, for the same offense.

ARGUMENT

I. THE PLACING OF APPELLANT IN A LINEUP IN THE ABSENCE OF HIS ATTORNEY WHO HAD REQUESTED NOTICE OF THE TIME OF THE LINEUP AND WHO DID NOT RECEIVE SUCH NOTICE DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO COUNSEL

With respect to Part I, appellant desires the Court to read the following pages of reporter's transcript: Tr. 66-68, 136, 263-271, 306-307, inclusive.

There is a split among the circuits as to whether there is a right to counsel at a pre-trial identification. This Court held in its per curiam opinion in Williams v. United States, 120 U.S. App. D.C. 244, 345 F.2d 733 (1965), that the right to counsel did not extend that far. The Second and Ninth Circuits have taken similar positions in cases which are now before the Supreme Court on the merits. Stovall v. Denno, 355 F.2d 731 (2d Cir. 1966) (Friendly, J., dissenting), cert. granted, 384 U.S. 1000 (1966); Gilbert v. United States, 366 F.2d 923 (9th Cir. 1966) (Browning, J., dissenting), cert. granted, 385 U.S. 882 (1966).[1/] The

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1/ The Supreme Court of California reached the same conclusion in Gilbert v. California, 63 Cal.2d 690, 408 P.2d 365 (1965), in which certiorari has been granted. 384 U.S. 985 (1966). References in this Brief to "Gilbert" are to the decision of the Ninth Circuit cited in the text and not to the decision of the Supreme Court of California.

Fifth Circuit, in an opinion written by Chief Judge Tuttle, recently took the opposite view, Wade v. United States, 358 F.2d 557 (5th Cir. 1966); that decision is also pending before the Supreme Court on certiorari. 385 U.S. 811 (1966).

We believe that under Miranda v. Arizona, 384 U.S. 436 (1966), which capped a series of cases on the right to counsel and which was not before this Court in the Williams case, the position of the Fifth Circuit is correct and should be followed here. Identifications at lineups are critical stages in criminal proceedings and, like interrogations, are subject to possible abuse. These considerations call for the presence of counsel. However, reversal of the conviction below does not require this Court to overrule Williams, for -- unlike the situation in that case -- appellant's attorney had specifically requested permission to be present at the lineup.

A. Appellant's right to counsel attached prior to the lineup.

The Supreme Court has held that the right to counsel, protected by the Sixth Amendment, attaches at the time when a general inquiry into an unsolved crime shifts from the investigatory to the accusatory stage and focuses on the accused. In Escobedo v. Illinois, 378 U.S. 478 (1964), the police questioned a suspect who had requested and been denied the opportunity to consult with his attorney and who had not

been effectively advised of his constitutional rights. The Supreme Court held that, in the particular circumstances of that case, the accused was entitled to counsel during interrogation. Miranda v. Arizona, 384 U.S. 436 (1966) expanded the right to counsel. The court there ruled that whenever an investigation focused on an accused, certain procedural safeguards -- including the giving of advice on the right to silence and the right to counsel and affording the opportunity to consult with counsel -- must be accorded before any interrogation could take place.

In the present case there can be no doubt that at the time of appellant's arrest the investigation had focused on him within the test set forth in Escobedo. The police had compared fingerprints found at the scene of the crime with those of appellant in the police files. (Tr. 136) Based on this comparison, a warrant was issued on July 2, 1965 for appellant's arrest. Thereafter, the police were actively looking for appellant. (Tr. 68) Four days later on July 6, 1965 appellant, accompanied by his attorney, surrendered to the police. (Tr. 263) The next morning the police placed appellant in the lineup. (Tr. 66)

These facts distinguish Kennedy v. United States, 122 U.S. App. D.C. 291, 353 F.2d 462 (1965). This Court there held, prior to Miranda, that an attorney did not have

to be present during a particular identification of a suspect. In that case, the confrontation between victim and suspect took place at the scene of the crime immediately after its occurrence, as the suspect sought to flee the premises. Thus, unlike the situation here, there had been no prior detailed investigation singling out a particular individual for special attention.

B. The lineup was a critical stage in the criminal proceeding where the assistance of counsel was required to protect appellant's rights.

Once the right to counsel has attached, it applies to all critical stages of a criminal proceeding. White v. Maryland, 373 U.S. 59 (1963) (Maryland preliminary hearing); Hamilton v. Alabama, 368 U.S. 52 (1961) (Alabama preliminary hearing). It applies to extra-judicial, as well as judicial proceedings. In Massiah v. United States, 377 U.S. 201 (1964), the right was extended to an indirect and surreptitious interrogation outside the police station. And in Miranda and Escobedo, the Supreme Court required the assistance of counsel at a police interrogation prior to the institution of any formal judicial proceedings.

The rationale of these cases, in particular Miranda, calls for the presence of counsel in all confrontations between the accused and the authorities, which might critically affect the outcome of the trial. That a lineup may have a

critical effect on a subsequent trial can scarcely be doubted. For, as Judge Browning pointed out in his dissent in Gilbert:

> "What takes place during the lineup might lay the foundation for conviction as surely as responses to extra-judicial interrogation. It might, just as clearly, reduce to mere form the right to have guilt or innocence determined at a public trial before a judge in an orderly courtroom, protected by the procedural safeguards of the law, and effectively assisted by counsel." 366 F.2d at 953.

The present case illustrates the importance of a lineup. The complaining witness identified appellant in the lineup three weeks after the crime and also identified him at trial ten months later. (Tr. 66-67) It may reasonably be assumed that the events of the lineup had some influence on the identification at trial. In turn, her identification of appellant at trial was a decisive factor in the outcome. Identification was the central issue at trial, and hers was the only eye-witness testimony offered.

Lineups can be critical in another respect: like interrogations, they present possibilities of abuse. Miranda held that procedural safeguards, including the assistance of counsel, were necessary to protect against interrogation abuses. But a lineup presents similarly disturbing opportunities for unfair police tactics. A little coaching of a witness prior to a lineup, a whispered word or a nudge from

a police officer during a lineup, could well persuade a witness that the accused is the individual to be identified.

Indeed, in Miranda the Supreme Court referred to techniques by which police have manipulated a lineup to achieve a desired identification:

> "The interrogators sometimes are instructed to induce a confession out of trickery. The technique here is quite effective in crimes which require identification or which run in series. In the identification situation, the interrogator may take a break in his questioning to place the subject among a group of men in a lineup. 'The witness or complainant (previously coached, if necessary) studies the line-up and confidently points out the subject as the guilty party.' Then the questioning resumes 'as though there were now no doubt about the guilt of the subject.' A variation of this technique is called the 'reverse line-up':
>
> > 'The accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations.'"
> 384 U.S. at 453.

And just as counsel can mitigate the possibility of interrogation abuses, so the presence of counsel can help protect the accused from the abuses of a rigged lineup. It makes no sense to draw a distinction between a case where a lineup is used improperly to induce a confession and one where it is used to produce an identification. The point,

as it was in Miranda, is that the opportunity for overreaching is sufficiently significant as to require the presence of counsel. It would follow that the right to counsel is as valid here as it was in Miranda.

Contrary to the majority's view in Gilbert and in Stovall, the presence of an attorney can have a practical impact on lineups, just as Miranda had suggested would be true of interrogations. The attorney could advise his client not to make any verbal responses requested by the police. Wade, 358 F.2d at 560. He might be able to persuade the prosecution -- or a court for that matter in an application for a protective order -- to eliminate some unfair strategem. Stovall, 355 F.2d at 744 (Friendly, J., dissenting). As Judge Browning suggested in his dissent in Gilbert, the prosecutor might agree to afford defense counsel "a prior opportunity to question the identification witnesses" or to assure the selection of "participants in the lineup who are not grossly dissimilar from the accused in physical appearance." 366 F.2d at 953. Further, an attorney could observe questionable procedures which the accused could not see or hear, and, if necessary, testify about them. Finally, as the Supreme Court stated in Miranda, the mere presence of a lawyer will reduce the likelihood of police abuse. 384 U.S. at 470. In other words, "the presence of counsel at the lineup would

serve to preserve the benefits which we attribute to our accusatorial, adversary system of justice." Gilbert, 366 F.2d at 954 (Browning, J., dissenting).

This Court's decision in Williams and the Second Circuit's decision in Stovall came before the Supreme Court had decided Miranda, and may properly be distinguished on that basis.[2/] Furthermore, in Stovall the situation confronting the police authorities was of an emergency character -- the identifying witness was in serious condition in the hospital. 355 F.2d at 740 (Lumbard, C. J., concurring) Here, no such emergency was present.

Certainly, Miranda cannot be disregarded on the ground that the right to counsel must be limited to cases of interrogation and confession. The right to counsel exists independently of the privilege against self-incrimination. Neither enjoys a more lofty constitutional position than the other. Miranda itself did not treat the two rights as co-extensive; indeed, the Court suggested that counsel could play a role unrelated to the protection of the privilege against self-incrimination. 384 U.S. at 290. The failure

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2/ The decision of the California Supreme Court in the other Gilbert case was likewise reached prior to Miranda. Gilbert v. California, 63 Cal.2d 690, 408 P.2d 365 (1965). As we have noted, it also is pending before the Supreme Court on certiorari. 384 U.S. 985 (1966).

of the Second and Ninth Circuits to recognize the importance of the assistance of counsel wholly aside from the protection of the Fifth Amendment privilege was partially responsible for leading those courts astray in the Stovall and Gilbert cases. For, as Judge Friendly noted in his Stovall dissent,

> " . . . although the two rights often overlap, they are not congruent. No one would suppose, for example, that because the Fifth Amendment, does not protect a defendant from being compelled to stand up in court and try on a garment found at the scene of the crime, the prosecutor could require defense counsel to absent himself during such an episode." 355 F.2d at 743.

C. Having failed to deny the request of appellant's attorney to be present at the lineup, the police unfairly prejudiced appellant by proceeding with the lineup in the absence of the attorney.

The evidence shows that at the time of appellant's surrender his attorney stated to a police officer that she wished to be present at the lineup.[3/] The attorney asked the officer to notify her as to the time of the lineup, and gave him her card in the process. (Tr. 265-267) There is no evidence that the police turned down the attorney's request.

3/ There was a conflict in testimony as to which police officer was involved. Appellant testified that it was Detective Wolfgang (Tr. 266). Detective Wolfgang testified that it was Detective Bonoccorsy. (Tr. 306-307) The prosecutor did not call Detective Bonoccorsy to resolve this conflict or to attempt to impeach appellant's testimony.

It is a well known fact that lineups are generally set up with strong lights focused on the participants so that they cannot see the viewers. Because of the police's failure to deny the attorney's request, appellant was entitled to assume that his attorney would be present at the lineup to observe what he, the appellant, could not see and to protect his rights. Appellant's testimony shows that he was quite concerned that the lineup might be conducted in an unfair manner. (Tr. 267-271)

If the police had denied the request of appellant's attorney, both appellant and his attorney might have acted quite differently. For example, appellant might have decided not to follow the standard practice at lineups -- this usually calls for the suspect to step forward when his number is called and to make verbal responses if requested by the police. As for his attorney, the police's failure to notify her may have caused her to forego other legal procedures she might have utilized such as seeking a protective court order that she be allowed to be present. See Stovall, 355 F.2d at 744 (Friendly, J., dissenting). These facts alone distinguish the Williams decision -- even if, contrary to our view -- that case is still good law in this jurisdiction; in Williams there had been no request for an attorney to be present at the lineup.

Because of the denial of the right to counsel in this case, the conviction must be reversed. In any retrial the testimony relating to the lineup itself should be excluded. Indeed, in our view the obvious relationship between the events of the lineup and the complaining witness's identification at trial would call for the exclusion of this identification testimony as well. If this Court is not satisfied that the events of the lineup rendered the identification testimony inadmissible, the extent of the taint could [redacted] be the subject of a separate proceeding prior to retrial. For the test to be applied in making this determination, see Judge Browning's dissent in Gilbert, 366 F.2d 956-958.

* * *

The failure of the appellant's attorney at trial to object to testimony on the lineup is of no moment. It was sufficient, in a capital case involving the constitutional right to counsel, that she had asked the police to be notified of the lineup and had put the trial judge on notice of her objection to the conducting of the lineup in her absence. (Tr. 265) This was adequate to preserve the point for review by this Court. Thus, in Stovall, the Second Circuit en banc gave full consideration to the merits of this constitutional issue even though it had not been presented to the trial court. In Gilbert the majority held that the motion to strike the

taken from a newspaper and envelope allegedly found at the scene of the instant crimes. On the basis of this comparison a warrant was issued for appellant's arrest.[4/] Appellant was arrested pursuant to this warrant on July 6, 1965. Shortly after this arrest appellant's fingerprints were taken again. (Tr. 143)

At the trial below the prints taken after the 1965 arrest were introduced into evidence (Tr. 142-143), over timely objection. (Tr. 122) The prosecution used said prints to show that the prints on the newspaper and envelope were those of appellant. (Tr. 151, 154-160) Appellant's attorney had objected to the introduction of the 1965 prints on the ground that the arrest warrant, which preceded the taking of those prints, was unlawful, because it was based on prints taken in connection with the 1960 proceeding which led to conviction and sentence under the Federal Youth Corrections Act. Since the 1960 conviction had been set aside, appellant's attorney argued that records relating to that

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4/ The above facts must be taken as established for purposes of this appeal. They were included in a proffer which was made by appellant's attorney and on the basis of which the trial judge made his ruling. (Tr. 136)

proceeding could not be used by the Government in another criminal matter.[5/]

Section 5021(a) of the Federal Youth Corrections Act provides:

> "Upon the unconditional discharge by the Division of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the Division shall issue to the youth offender a certificate to that effect." (Emphasis added.) 18 U.S.C. § 5021(a) (1964).

Thus, the issue for determination by this Court is whether the automatic setting aside of the conviction prevents the police from using the fingerprints relating to that conviction as the basis for a subsequent arrest warrant. In our view such a bar is required by the underlying purposes of the Youth Corrections Act.

The Act provides a system for the sentencing and treatment of prisoners under 22 years of age. It is designed to "promote the rehabilitation of those who in the opinion of the sentencing judge show promise of becoming useful citizens."

5/ This same contention was raised by appellant's attorney in two other criminal cases involving appellant in the District Court. It was rejected by the District Court in both cases. United States v. Ernest S. Borum, Crim. No. 944-65 (February 25, 1966); United States v. Ernest S. Borum, Crim. No. 943-65 (January 14, 1966). This contention was also argued by court-appointed counsel in the appeals from these two convictions (Court of Appeals No. 20,093, filed March 2, 1966 and Court of Appeals No. 19,960, filed January 25, 1966 respectively) on October 20, 1966 and June 13, 1966 respectively. As of this writing, no decision by this Court has been rendered in either of these appeals.

In furtherance of this goal, the Act calls for use of those methods which "will effect such rehabilitation and restore normality." It thus seeks to substitute "correctional rehabilitation for retributive punishment." H. R. Rep. No. 2979, 81st Cong., 2d Sess. 1-4 (1950).

The decisions reflect this progressive philosophy. For a recalcitrant prisoner, a sentence under this Act may result in a longer period of confinement than the maximum adult sentence provided for the particular offense. Cunningham v. United States, 256 F.2d 467 (5th Cir. 1958), followed in Carter v. United States, 113 U.S. App. D.C. 123, 306 F.2d 283 (1962). But to balance this potentially extended confinement, the youth offender is offered a planned program of education, treatment and rehabilitation, Brisco v. United States, 246 F. Supp. 818, 820 (D. Del. 1965), which can also result in his release at an early date.

A major inducement to self-help and good conduct on the part of the prisoner is the setting aside of the conviction. When the youth offender completes his program of education and treatment, he is freed from the taint of his prior criminal conviction and allowed to rejoin society on an equal basis with those individuals who have not been convicted. In Rogers v. United States, 326 F.2d 56, 57 (10th Cir. 1963) the Tenth Circuit referred to the provision

for setting aside the conviction as the "most important of all." Similarly, this Court has properly noted that this provision of the Act has a greater operative effect than a presidential pardon, for it not only restores civil rights but expunges the conviction itself. Tatum v. United States, 114 U.S. App. D.C. 49, 51 n. 2 , 310 F.2d 854, 856 n. 2 (1962).

We would suggest that this rationale for expunging the criminal conviction of a youth offender similarly calls for a ban on police use of all matters incident to that conviction. The one can as easily return to haunt the offender as the other. Only if the authorities undertake to wipe the previous slate completely clean, not just partially clean, can the youth offender be expected to exercise that degree of self-help which lies at the heart of the rehabilitation process.

The subsequent use by law enforcement officials of matters related to the conviction process can be just as destructive of that sense of mutual reliance on which youth rehabilitation depends as the fact of conviction itself. Surely, statements given by a youth offender to court officials during pre-sentencing procedure could not be used in a later trial involving subsequent post-release acts. For example, if a youth were to disclose bitter hatred of a parent

during the course of a pre-sentence investigation, that statement should not be introduced in a subsequent trial to establish motive for the killing of that parent. There is no reason to treat fingerprints any differently, and as Miranda teaches and as we have noted previously, the investigatory process is a key aspect of the means by which supposed criminals are identified and hence an integral part of the conviction process.

This policy is a gamble on the part of society, in that some youth backsliders who commit crimes may go unpunished. But it represents, we submit, a gamble which the Congress chose in an effort to curtail, through progressive rehabilitation, that recidivism which has plagued society for many years and which Congressmen and law enforcement officials have repeatedly deplored.

The actions of the prosecutor and the trial judge below support the foregoing construction of the Youth Corrections Act. Both took pains to assure that the fingerprints taken in connection with the 1960 conviction were not introduced into evidence in the current trial. (Tr. 138) They apparently took the position that the 1960 prints constituted proper support for an arrest warrant but did not constitute proper evidence at the subsequent trial. We see no basis for such a distinction. If the 1960 prints cannot

be used to secure the 1965 conviction -- as the Judge and prosecutor apparently believed -- they cannot be used to support the arrest which led to that conviction.

In other appeals involving this appellant the United States has argued that considerations of public policy outside the criminal law require that the fingerprints be kept on record.[6/] We would concede that on this basis it may be justifiable for the authorities to use such fingerprints to identify accident victims. But this fact does not support the use of such fingerprints in a subsequent criminal proceeding. Use of the prints for accident investigation entails no detriment or prejudice to the discharged youth offender. The same cannot be said of their use to support an arrest.

B. The fingerprints taken from appellant at the time of his illegal arrest were inadmissible at trial.

As we have pointed out, the fingerprints taken in 1960 in connection with appellant's conviction and sentence under the Federal Youth Corrections Act were not introduced at the trial below. But the prosecution did

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6/ See Brief for Appellee, pp. 6-7, Borum v. United States, No. 20,093 (D.C. Cir., filed March 2, 1966) and Brief for Appellee, pp. 6-7, Borum v. United States, No. 19,960 (D.C. Cir., filed January 25, 1966).

introduce, over objection, the prints taken from appellant at the time of his illegal arrest in July, 1965. Since the 1965 fingerprints were the product of an illegal arrest, it was reversible error to admit them.[7/]

In Bynum v. United States, 104 U.S. App. D.C. 368, 262 F.2d 465 (1958), this Court decided that the fruits of an illegal search, even though of a highly probative and trustworthy nature, may not be introduced into evidence against the accused. See also Gatlin v. United States, 117 U.S. App. D.C. 123, 326 F.2d 666 (1963) and Greenwell v. United States, 119 U.S. App. D.C. 43, 336 F.2d 962 (1964). In Bynum, fingerprints had been taken from a defendant after arrest; the trial court had admitted the prints into evidence. This Court held that the arrest was invalid for lack of probable cause and that, accordingly, prints taken in connection with the arrest were inadmissible. In rejecting the Government's argument that other prints of the accused, properly obtained, could easily have been used, this Court stated:

> "It bears repeating that the matter of primary judicial concern in all cases of this type is

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7/ The argument in this Part applies with equal force to the testimony at trial relating to the lineup discussed in Part I. If the arrest was illegal, testimony was inadmissible as to the lineup which took place shortly after the arrest. The failure of the trial judge to strike this testimony was plain error, and accordingly, this issue is properly before this Court despite the absence of any request to strike at trial. Fed. R. Crim. P. 52(b).

the imposition of effective sanctions implementing the Fourth Amendment guarantee against illegal arrest and detention. Neither the fact that the evidence obtained through such detention is itself trustworthy or the fact that equivalent evidence can conveniently be obtained in a wholly proper way militates against this overriding consideration. It is entirely irrelevant that it may be relatively easy for the government to prove guilt without using the product of illegal detention. The important thing is that those administering the criminal law understand that they must do it that way." 104 U.S. App. D.C. at 371, 372, 262 F.2d at 469.

III. IN A RAPE CASE IT WAS REVERSIBLE ERROR FOR THE TRIAL JUDGE TO PERMIT THE JURY TO TREAT AS CORROBORATIVE EVIDENCE THE PRESENCE OF SPERMATOZOA IN THE VAGINA OF THE COMPLAINING WITNESS WHO WAS MARRIED AND LIVING WITH HER HUSBAND.

With respect to Part III, appellant desires the Court to read the following pages of the transcript: Tr. 12, 77-85, 175, 325, 411, 417, inclusive.

In this jurisdiction it is settled that to sustain a conviction for rape the testimony of the complaining witness must be corroborated by some independent evidence. Important policy considerations underlie this requirement. As pointed out in Kelly v. United States, 90 U.S. App. D.C. 125, 194 F.2d 150 (1952), the accusation that another has committed a sex offense is easy to make and difficult to rebut. In the case of rape the severity of the punishment, which can be death, underscores the importance of corroboration, which, however, can be either direct or circumstantial. Hughes v. United States, 113 U.S. App. D.C. 127, 306 F.2d 287 (1962) (fingerprints); McGuinn v. United States, 89 U.S. App. D.C. 197, 191 F.2d 477 (1951) (assailant found with his pants down); Brown v. United States, 69 U.S. App. D.C. 96, 99 F.2d 131 (1938) (identification by companion of victim).

In the trial below the prosecution relied on expert testimony to establish, as corroborating evidence, the presence

of spermatozoa in the vagina of the complaining witness. (Tr. 77-85) And the judge instructed the jury that it could consider such evidence as corroborative. (Tr. 411) Under the circumstances present this instruction was erroneous.

The presence of spermatozoa was probative of the fact of intercourse. However, it was not probative of the fact of rape, the identity of the other party, or the time of the intercourse.[8/] The evidence showed that complainant was a married woman living with her husband. (Tr. 88) Hence, the presence of spermatozoa in her vagina was as consistent with the occurrence of intercourse with her husband as with appellant.[9/]

This was not, therefore, a case where the fact of intercourse was itself corroborative because of the inference of prior chastity -- an inference which can be drawn where the complainant is an unmarried woman. See Ewing v. United States, 77 U.S. App. D.C. 14, 135 F.2d 633 (1942), cert. denied, 318 U.S. 776 (1943) (unmarried girl of nineteen); Lyles v. United States, 20 U.S. App. D.C. 559 (1902) (unmarried victim).

8/ The Government's expert testified that the spermatozoa could have been deposited up to seventy two hours before it was found.

9/ The prosecutor did not introduce any evidence to negate the possibility of intercourse with her husband. Nor did he attempt to link spermatozoa to someone other than her husband, much less to appellant.

And where evidence is equally consistent with guilt as with innocence, it cannot be considered corroborating. See Farrar v. United States, 107 U.S. App. D.C. 204, 213, 275 F.2d 868, 877 (1959) (Prettyman, J., denying petition for rehearing en banc). In this respect Kidwell v. United States, 38 U.S. App. D.C. 566 (1912) is dispositive. In that case the trial court had treated the pregnancy of a fourteen-year-old girl as corroborative of rape by the defendant. On appeal, the conviction was set aside because the trial court had refused to allow the defense attorney to question the complainant about intercourse with individuals other than the accused. As this Court quite properly noted, if the testimony had revealed intercourse with others, "the fact of pregnancy would have lost its corroborative force." 38 U.S. App. D.C. at 572. Similarly, in the instant case where the evidence is undisputed that the complaining witness was married and living with her husband, the presence of spermatozoa has no corroborative force on the question of rape.

The court's erroneous instruction below was prejudicial to appellant. The prosecutor mentioned the presence of spermatozoa in his opening remarks. (Tr. 12) The Government produced two expert witnesses to establish this

fact. (Tr. 77-85) In his closing remarks to the jury the prosecutor stated that this fact was corroborative of the commission of rape. (Tr. 325) Against this background the judge's charge might well have affected the jury's verdict and therefore requires reversal under the prejudicial error test of Fahy v. Connecticut, 375 U.S. 85 (1963).

Nor is the instruction saved by the presence of other evidence in the record which the jury could properly have treated as corroborative. There is no way of telling, under the judge's charge, whether the jury, in fact, considered as corroborative evidence that which was quite appropriate for this purpose or the evidence on spermatozoa which was entirely non-probative. And in view of the capital nature of the rape charge, any doubt should be resolved in favor of the appellant.[10/] See Hamilton v. Alabama, 368 U.S. 52 (1962).

This error in the charge is properly before this Court. Appellant's attorney stated to the trial judge that the presence of spermatozoa was not a corroborating fact when she moved for acquittal on the rape count after

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10/ Although the prosecutor did not request the death penalty, the jury was instructed that it could add a death penalty direction to a guilty verdict on the rape count. (Tr. 412)

the close of the Government's case. (Tr. 175) After the judge's charge appellant's attorney did not object specifically to this aspect of the charge, but she did renew all prior motions and objections. (Tr. 417) This was sufficient in a capital case to permit review of the error on appeal.

IV. BY INCREASING APPELLANT'S TERM OF IMPRISONMENT, THE SUPPLEMENTAL SENTENCING PROCEEDING, HELD FIVE DAYS AFTER THE ORIGINAL IMPOSITION OF SENTENCE, CONSTITUTED DOUBLE JEOPARDY IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS.

With respect to Part IV, appellant desires the Court to read the reporter's transcript of the sentencing proceedings held on June 10, 1966 and June 15, 1966.

A. The original sentence below provided a number of terms which, by explicit direction of the court, would run concurrently with each other and, by established judicial rule, would run concurrently with sentences then being served by appellant under other Federal convictions.

At the time of the trial below, the appellant was serving prior sentences for other Federal convictions. On January 17, 1966 he had been sentenced by the U. S. District Court for the District of Columbia (Criminal No. 944-65) to two to six years for housebreaking, and on February 18, 1966 by the same court (Criminal No. 943-65) to twenty months to

five years for housebreaking and robbery. As we have noted, both convictions are presently pending in this Court on appeal.

In the instant proceeding, on June 10, 1966 -- 29 days after completion of the trial -- Judge Corcoran sentenced appellant on Count 1 (housebreaking) to five to fifteen years, on each of Counts 4, 6, and 8 (assault with a dangerous weapon) to two to six years, on Count 5 (robbery) to five to fifteen years, and on Count 7 (rape) to five to twenty years. The judge explicitly stated that the terms so imposed were to run concurrently with each other.

But the judge did not mention whether the sentence imposed in this case was to run concurrently with or consecutively to the sentences in two prior Federal cases then being served by appellant. During the trial both the prosecutor and the defense attorney had referred to appellant's prior convictions, always out of the presence of the jury. (Tr. 126, 129) In addition, the pre-sentence report prepared for the judge by the probation office presumably mentioned the prior sentences.

Five days after the original sentence below, the trial judge recalled appellant from the District of Columbia Jail and, over the objection of his attorney, ordered that

the terms imposed in the instant proceeding should run consecutively with those for the prior convictions. This had the effect of increasing the term of imprisonment and was accordingly erroneous.

At the time of the first sentencing proceeding below, the judge could have provided that the sentence in this case was to run consecutively to the sentences in the prior cases. But in the absence of such a statement, the case is controlled by the established Federal rule that where there is no specific directive as to the relationship between one sentence and another sentence, the sentence shall run concurrently with the others.

One of the earliest expressions of this principle was given in United States v. Patterson, 29 Fed. 775, 778 (C.C. D. N.J. 1887). There, Mr. Justice Bradley stated that, where a sentencing court is silent as to the concurrent or consecutive nature of different sentences, "by force of law . . . each sentence should begin to run at once, and they would all run concurrently." The rule follows the accepted principle that "where there is any ambiguity the prisoner is entitled to have the language in the pronouncement [of sentence] construed most favorable to him." Gaddis v. United States, 280 F.2d 334, 336 (6th Cir. 1960). See

also Subas v. Hudspeth, 122 F.2d 85, 87 (10th Cir. 1941). And the presumption favoring concurrent sentences applies whether the sentences were promulgated contemporaneously, Engle v. United States, 332 F.2d 88, 91 (6th Cir. 1964), cert. denied, 378 U.S. 903 (1964), or were handed down on unrelated matters at different times. Mills v. Hunter, 204 F.2d 468 (10th Cir. 1953).

B. Since appellant had entered upon service of sentence in this case, it was error for the District Court to subsequently increase this sentence by providing that it was to run consecutively to the sentences then being served for other Federal convictions.

As we have previously noted, the effect of the second sentencing proceeding on June 15 below was to increase the terms of imprisonment to which the prisoner had been subjected on June 10. But the Federal rule is settled that a legal sentence cannot be increased after its service has commenced.[11/] "If appellant's first sentence was lawful a second sentence could not lawfully be imposed which increased it or made it more severe, once he had commenced serving confinement under it." Tatum v. United States, 114 U.S. App. D.C. 49, 50, 310 F.2d 854, 855 (1962).

Ex parte Lange, 85 U.S. (18 Wall.) 1963 (1873), set forth the basis for this rule. In holding that an

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11/ Of course, an illegal sentence may be corrected at any time. Fed. R. Crim. P. 35.

increase in sentence was as much a violation of the Fifth Amendment as a second trial for the same offense, the Supreme Court stated:

> "It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?
>
> "The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." 85 U.S. (18 Wall.) at 173.

In view of the importance of the constitutional principle, it is not surprising that a sentence can be increased only if the prisoner has not commenced to serve it. This qualification permits stiffer terms to be imposed only where the prisoner has not left the courtroom, Vincent v. United States, 337 F.2d 891 (8th Cir. 1964), cert. denied, 380 U.S. 988 (1965), rehearing denied, 381 U.S. 947 (1965), or where he has not left the courthouse, Walton v. United States, 92 U.S. App. D.C. 26, 202 F.2d 18 (1953).

But these exceptions do not apply where, as here, the appellant not only had left the courthouse but also had been taken to and lodged in the District of Columbia Jail. The sentence started to run at the time he was received at the Jail. Act of June 25, 1948, ch. 645, 62 Stat. 838, as amended, 18 U.S.C. § 3568 (1964). He was, then, no longer "in the court's custody." Vincent v. United States, 337 F.2d at 894.

CONCLUSION

For the foregoing reasons this Court should reverse the conviction and order the court below to enter a judgment of acquittal; or it should order that the court below hold a new trial; or it should order that appellant's sentence be modified so that it runs concurrently with the two other Federal sentences presently being served; or it should grant such further or different relief as it deems appropriate.

Respectfully submitted,

HOWARD C. WESTWOOD

701 Union Trust Building
Washington, D. C. 20005

Attorney for Appellant
(By Appointment of this Court)

Of Counsel:

T. ROGNALD DANKMEYER, JR.

COVINGTON & BURLING

701 Union Trust Building
Washington, D. C. 20005

May 3, 1967

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3d day of May, 1967, he has served the foregoing Brief for Appellant on the United States Attorney by causing two copies thereof to be delivered to David G. Bress, United States Attorney, United States Courthouse, John Marshall Place, Washington, D.C.

Howard C. Westwood

HOWARD C. WESTWOOD

701 Union Trust Building
Washington, D.C. 20005

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,270

ERNEST S. BORUM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
Assistant United States Attorneys.

HENRY K. OSTERMAN,
Special Attorney to the United States Attorney.

Cr. No. 942-65

QUESTIONS PRESENTED

In the opinion of the appellee, the questions presented are:

1. Has appellant been deprived of a Constitutional right requiring reversal of his conviction after jury trial because his attorney was not permitted to attend a routine police lineup held solely for the purpose of identification?

2. Is it reversible error for the trial court to charge the jury that it may consider the presence of spermatozoa in the vaginal cavity of a married woman living with her husband as corroborative evidence of rape, where the record contains additional evidence to corroborate the rape?

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TABLE OF CASES

Cases—Continued

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,270

ERNEST S. BORUM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was arrested on July 6, 1965 after surrendering to the police in the company of his counsel (Tr. 263). At the time of his arrest appellant's counsel requested that she be notified of the time and date of the police lineup so that she could attend (Tr. 266-69). Counsel did not receive the requested notification and did not attend the lineup which was held the next day (Tr. 306-07).

On August 16, 1965, appellant was indicted by the grand jury and on May 9-11, 1966 he was tried under the indictment which contained eight (8) counts, including housebreaking, robbery, assault with a dangerout weapon, and rape. At this time, appellant was

serving sentences imposed as a result of two earlier convictions.[1] At the end of the Government's case, two counts (Nos. 2 and 3) were dismissed pursuant to appellant's motion (Tr. 170, 173, 204-05). Appellant was found guilty of each of the six remaining counts and on June 10, 1966 received the following sentences, to run concurrently with each other:

Count No. 1 (housebreaking)	5 to 15 years
Count No. 4 (assault with a dangerous weapon)	2 to 6 years
Count No. 5 (robbery)	5 to 15 years
Count No. 6 (assault with a dangerous weapon)	2 to 6 years
Count No. 7 (rape)	5 to 20 years
Count No. 8 (assault with a dangerous weapon)	2 to 6 years

On June 15, 1966, appellant and his counsel were recalled by the trial court for the purpose of "clarification for the record" regarding the sentences imposed on June 10th. The sentencing judge stated that it was his intention that the concurrent sentences imposed on June 10th should run consecutively to the sentences appellant was already serving as a result of his two prior convictions. Appellant's counsel objected to the resentencing procedure on constitutional grounds.[2] This appeal followed.[3]

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[1] *United States* v. *Borum*, Crim. No. 943-65, *reversed* May 19, 1967, D.C. Cir. No. 19960; *United States* v. *Borum*, Crim. No. 944-65, *affirmed* May 19, 1967, D.C. Cir. No. 20093.

[2] Since appellant had begun service of his sentence (18 U.S.C. § 3568) concurrently with his sentences in Crim. No. 943-65 (Appeal No. 19,960, conviction reversed May 19, 1967) and Criminal No. 944-65 (Appeal No. 20,093, conviction affirmed May 19, 1967), there was no power in the court to increase the sentence by a subsequent proceeding at which it was ordered, in effect, that the yet to be filed judgment and commitment should reflect that service of sentence shall be consecutive to the sentences in the other criminal cases. See *Rowley* v. *Welch*, 72 App. D.C. 351, 114 F.2d 499 (1940) and cases cited therein; *Tatum* v. *United States*, 114 U.S. App. D.C. 49, 310 F.2d 854 (1962); *United States* v. *Sacco*, 367 F.2d 368, 369 (2d Cir. 1966); *United States* v. *Byars*, 290 F.2d 515, 516 (6th Cir. 1961).

[3] On April 21, 1967 appellant filed in this Court a Motion for Reversal of Judgment for want of a prompt transcript. The Motion was denied by *per curiam* order of May 22, 1967.

The testimony given at the trial was as follows. Mrs. Lucy Wilson, 80 years of age, testified that on June 14, 1965 an intruder entered her home at 2308 Naylor Road, Southeast Washington, struck her on the head with a pistol knocking her to the floor, and then struck her repeatedly with his pistol whenever she attempted to get up (Tr. 40-42).

Ralph Jennings, a laundry delivery man, testified that he came to Mrs. Wilson's door at about 11 a.m. on June 14, 1965 and that the door was opened by appellant holding a pistol. He was ordered into a bedroom where appellant gagged and bound him and left him lying across a bed after first taking $285.00 from him (Tr. 16-18, 21-22).

Mrs. Clarke, a neighbor, testified that at about 11 a.m. she heard Mrs. Wilson moaning and that she entered Mrs. Wilson's apartment through the kitchen door to investigate (Tr. 37); that she was accosted by appellant holding a gun who ordered her to remove her clothing and then raped her (Tr. 37-39, 45-49).

The record further shows that appellant fled from Mrs. Wilson's home at about 11:30 a.m. and that Mrs. Clarke immediately telephoned her husband and the police to report the rape (Tr. 90, 96). Mrs. Clarke's report of the assault was confirmed by Ralph Jennings who testified that he observed Mrs. Clarke standing naked in a doorway with a telephone in her hand (Tr. 24-25, 30). Jennings also stated that Mrs. Clarke was crying and hysterical at the time (Tr. 31-32).

Dr. Terrafranca, Mrs. Clarke's personal physician, testified that Mrs. Clarke was brought to his office on June 14th; that he was told of the assault; that he examined Mrs. Clarke particularly her pelvic area; and that he made some smears which he took to Providence Hospital for analysis (Tr. 78-80). Dr. Terrafranca also testified that Mrs. Clarke was "rather tense" and "upset" but that she "was trying to control herself" (Tr. 81-82).

Dr. Morales, a pathologist at Providence Hospital, testified that he examined the smears delivered by Dr.

Terrafranca and that they contained human spermatozoa (Tr. 83-85). It was stipulated also that spermatozoa was found on Mrs. Clarke's underclothing (Tr. 117, 411).

At the conclusion of the testimony (Tr. 417) appellant's counsel renewed all objections and all motions for a directed verdict of acquittal made earlier in the case (Tr. 174-176).

The trial court then instructed the jury with respect to the various counts in the indictment. His instructions dealing with the corroborating evidence of rape included a statement to the effect that the jury could consider, among other things, the testimony of Doctors Terrafranca and Morales regarding the presence of spermatozoa in Mrs. Clarke's vaginal cavity (Tr. 411). Appellant's counsel made no objection to the court's charge relating to the presence of spermatozoa and expressed herself as being satisfied with the instructions except in one respect which is not an issue in this appeal (Tr. 416).[4]

RULE INVOLVED

Rule 30, Federal Rules of Criminal Procedure, provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider

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[4] See footnote 8 pages 8-9, *infra*.

its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

SUMMARY OF ARGUMENT

I

Appellant may not on appeal object to the admission of testimony given at the trial where appellant failed to make an objection below. In any event, the refusal of the Metropolitan Police Department to permit appellant's counsel to attend a routine police lineup at which time appellant was identified by a complaining witness did not deprive appellant of his Sixth Amendment right to counsel.

II

Appellant may not on appeal object to the trial court's charge where no objection was made prior to the time that the case was submitted to the jury and when trial counsel announced satisfaction with the instructions. In any event, the trial court's instructions that the jury may consider as corroborative evidence of rape testimony relating to the presence of spermatozoa in the vaginal cavity of the complaining witness, a married woman living with her husband, was not error, especially since the record contains additional corroborative evidence of the *corpus delecti*. Evidence that the victim was married and living with her husband merely affects the probative value of the evidence relating to the presence of spermatozoa and was a factor for the jury to consider.

ARGUMENT [5]

I. Appellant's constitutional rights were not infringed by the failure of the police to permit appellant's attorney to be present at the police lineup.

(Tr. 267, 268, 269, 270, 288, 289, 290, 291)

Appellant relies upon *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), to support his argument that appellant's counsel should have been permitted to attend the lineup at which appellant was identified by the complaining witnesses. He urges that testimony given at the trial relating to the appellant's identification at the lineup should have been excluded, and that the trial court's failure to exclude this testimony constitutes reversible error. We do not agree.

At the outset, we note that appellant concedes that no objection to the admission of this testimony was made by appellant's trial counsel (App. Br. 24) and for this reason alone appellant is now precluded from raising this objection for the first time on appeal. *Pratt* v. *United States*, 96 U.S. App. D.C. 184, 225 F.2d 23 (1955), *cert. denied*, 357 U.S. 912; *Sykes* v. *United States*, 79 U.S. App. D.C. 97, 143 F.2d 140 (1944); *Lawson* v. *United States*, 101 U.S. App. D.C. 332, 248 F.2d 654 (1957); *Accardo* v. *United States*, 102 U.S. App. D.C. 4, 249 F.2d 519 (1957), *cert. denied*, 356 U.S. 943 (1958); *United States* v. *Jones*, 204 F.2d 745 (7th Cir. 1953); *United States* v. *Gillette*, 189 F.2d 449 (2d Cir. 1951), *cert. denied*, 342 U.S. 827 (1951).

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[5] Appellant's second point (Appl. Br. 25-33)—that his arrest was illegal because the warrant was issued after comparison of fingerprints taken when he was arrested and sentenced under the Federal Youth Corrections Act in 1960, and that testimony relating to these fingerprints should not have been admitted in evidence—has already been rejected by this Court. On May 19, 1967 this Court in *Borum* v. *United States*, No. 20,093, rejected the identical argument made by this appellant. See *Mallory* v. *United States*, 104 U.S. App. D.C. 71, 259 F.2d 801 (1958); *Robinson* v. *United States*, 106 U.S. App. D.C. 325, 272 F.2d 554 (1959).

Apart from this bar, moreover, we believe that appellant's underlying argument is wholly without merit. The holdings of this Court are contrary to the position now espoused by appellant, *Williams* v. *United States*, 120 U.S. App. D.C. 244, 345 F.2d 733 (1965), *cert. denied*, 382 U.S. 962 (1965). See *Kennedy* v. *United States*, 122 U.S. App. D.C. 291, 353 F.2d 462 (1965); accord, *United States ex rel. Stovall* v. *Denno*, 355 F.2d 731 (2d Cir. *en banc* 1966). It is crystal clear from the majority opinion in *Miranda* that the Supreme Court was concerned only with the admissibility of *statements* made by an accused while held incommunicado by law enforcement officials.

> We deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation, [384 U.S. at 439]
>
> * * * *
>
> The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody and deprived of his freedom of action, [384 U.S. at 445]

See also *Schmerber* v. *California*, 384 U.S. 757 (1966).

This Court dealt with the specific issue shortly after the *Escobedo* case was decided by the Supreme Court and specifically rejected the suggestion that a defendant's counsel must be present at an ordinary police lineup, *Williams* v. *United States*, *supra*. See also *Kennedy* v. *United States*, *supra* (1965). In *Williams* this Court found no violation of the defendant's Sixth Amendment right where defendant's counsel was not present at a routine lineup for purposes of identification. Judge Burger's concurring opinion pointing out that the Supreme Court in *Escobedo* was concerned only with statements made by an accused while under police interrogation underlines the weakness of appellant's argument.[6]

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[6] *Wade* v. *United States*, 358 F.2d 557 (5th Cir. 1966), *cert. granted*, 385 U.S. 811 (1966), relied upon by appellant, presented a somewhat different factual situation in which the trial court found that defendant had not appeared at an "ordinary police

Appellant's argument that he was further prejudiced because the police did not affirmatively deny his counsel's request to be present at the lineup (App. Br. 23) is frivolous and may be disregarded.

II. Appellant who acquiesed in the trial court's charge when given may not properly object to the charge on appeal. In any event the trial court's charge was proper.

(Tr. 17, 24-25, 30-32, 81-82, 90, 96, 174, 176, 411)

Appellant's appellate objection to the trial court's instructions—delayed until after the return of an unfavorable verdict—should not be considered by this Court, *Rule 30, Federal Rules of Criminal Procedure.*[7] Appellant concedes that he made no objection to the trial court's reference to the presence of spermatozoa in the instructions given the jury (App. Br. 38). In fact the record shows that appellant's experienced trial counsel was fully satisfied with the instructions on that point.[8]

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lineup" because he had been directed by the police to speak certain identifying phrases for the benefit of the complaining witnesses, and had been pointed out to the latter prior to the lineup. *Wade* is now pending before the Supreme Court. However, in this jurisdiction the rule established by *Williams* v. *United States, supra* and *Kennedy* v. *United States, supra,* is controlling and should not be disturbed unless the Supreme Court rules otherwise, *Robinson* v. *United States,* 106 U.S. App. D.C. 325, 272 F.2d 554 (1959); *Mallory* v. *United States,* 104 U.S. App. D.C. 71, 259 F.2d 801 (1958).

[7] Rule 30 of the Federal Rules of Criminal Procedure expressly states:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

[8] THE COURT: Is there anything further?

MRS. DWYER: There is one request I do have your Honor: Under the Franklin case as I understand it, there must be not only corroboration of the fact of the rape itself but there must be corroboration of the identity of the perpetrator of the rape. *And while Your Honor's charge was certainly full in the matter*

This Court has indicated that where, as in this case a defendant's trial counsel expresses satisfaction with the judge's instructions, he may not thereafter raise any objection to those instructions on appeal. *Kelly* v. *United States*, 124 U.S. App. D.C. 44, 361 F.2d 61 (1966).[9]

Moreover, the record in this case contains ample evidence to corroborate the fact of rape in addition to the testimony relating to the presence of spermatozoa in the victim's vaginal cavity. Prompt report to the police is one of the most universally accepted forms of corroboration. *Hughes* v. *United States*, 113 U.S. App. D.C. 127, 129, 306 F.2d 287, 289 (1962). The record here shows that the rape occurred shortly after 11 a.m. (Tr. 17) and that the report of the rape was received by the victim's husband at 11:27 a.m. (Tr. 90) and by Detective Rinaldo of the Metropolitan Police at 11:30 a.m. (Tr. 96). Mrs. Clarke's testimony was further corroborated by the testimony of Ralph Jennings, the laundry man, who stated that he observed Mrs. Clarke standing completely nude with a telephone in her hand obviously minutes after the rape (Tr. 24-25, 30). Jennings also

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of the corroboration of the acts, I didn't hear any charge to the jury on corroboration of identity. (Emphasis added.) (Tr. 416.)

Appellant has not assigned as error the trial court's refusal to charge that corroboration of identity is also required to support a conviction for rape and, of course, this issue should not be considered on this appeal. Nevertheless, *Franklin* v. *United States*, 117 U.S. App. D.C. 331, 330 F.2d 205 (1964) does not require corroboration of identity where, as in the instant case, the victim had ample opportunity to observe her attacker. See *Thomas* v. *United States*, D.C. Cir. No. 20287, decided May 4, 1967; *Walker* v. *United States*, 96 U.S. App. D.C. 148, 223 F.2d 613 (1955).

[9] The renewal of prior motions for a directed verdict of acquittal (Tr. 174-176) made by appellant's trial counsel at the end of the entire case (Tr. 416) is not, as appellant urges (App. Br. 38) sufficient under Rule 30 to preserve appellant's right to assign as error any portion of the trial court's instructions. *Fisher* v. *United States*, 118 U.S. App. D.C. 165, 334 F.2d 555 (1964); *Engram* v. *United States*, 117 U.S. App. D.C. 30, 325 F.2d 226 (1963), *cert. denied*, 379 U.S. 980 (1965); *Richardson* v. *United States*, 119 U.S. App. D.C. 212, 338 F.2d 552 (1962); *McAllister* v. *United States*, 99 U.S. App. D.C. 256, 239 F.2d 76 (1956).

testified that Mrs. Clarke was crying and hysterical when she telephoned the police and that she reported the rape at that time (Tr. 31-32).

The testimony of Dr. Terrafranca that Mrs. Clarke was "rather tense" and "upset" at the time he made his physical examination and that "she was trying to control herself" (Tr. 81-82) is further corroboration of the rape, as is the stipulation that spermatozoa was found on Mrs. Clarke's underclothing (Tr. 117, 411). The foregoing meets the requirement that there must be "circumstances in proof which tend to support the prosecutrix' story." *Franklin* v. *United States*, 117 U.S. App. D.C. 331, 330 F.2d 205 (1964); *Walker* v. *United States*, 96 U.S. App. D.C. 148, 223 F.2d 613 (1955); *Ewing* v. *United States*, 77 U.S. App. D.C. 14, 135 F.2d 633 (1942); *Kidwell* v. *United States*, 38 App. D.C. 566 (1912). The fact is, in circumstances such as those presented by this case, there is virtually no danger of a fabricated claim of rape. The reason for the corroboration rule is absent. In any event, there was ample corroboration here.

Appellant cites no authority to support his assertion that it was reversible error for the trial court to refer to the testimony of Dr. Morales that male sperm was found in Mrs. Clarke's vaginal cavity, and no such authority has been found. While it is true that the probative value of such corroborative evidence may sometimes be lessened in the case of a married woman living with her husband, such evidence is not inadmissible, and it is within the province of the jury to determine its weight. See *Gunning* v. *Cooley*, 281 U.S. 90, 94 (1929); *Walford* v. *McNeill*, 69 App. D.C. 247, 100 F.2d 112 (1938). Certainly, there was more than sufficient evidence to provide the "circumstances in proof" required, *Franklin* v. *United States*, *supra*; *Walker* v. *United States*, *supra*; *Ewing* v. *United States*, *supra*.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed and that the written sentence be amended to conform to the oral sentence.[10]

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
Assistant United States Attorneys.

HENRY K. OSTERMAN,
Special Attorney to the United States Attorney.

[10] See footnote 2, *supra.*

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REPLY BRIEF FOR APPELLANT

In The

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

Ernest S. Borum, Appellant,

v. No. 20,270

United States of America, Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HOWARD C. WESTWOOD
701 Union Trust Building
Washington, D. C. 20005

Attorney for Appellant
(By appointment of this Court)

Of Counsel:

T. ROGNALD DANKMEYER, JR.

COVINGTON & BURLING

701 Union Trust Building
Washington, D. C. 20005

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,270

Ernest S. Borum, Appellant,

v.

United States of America, Appellee.

REPLY BRIEF FOR APPELLANT

STATEMENT OF THE CASE

In its Counterstatement of the Case, the appellee inadvertently says that Ralph Jennings testified that "the door was opened by appellant" and that "appellant gagged and bound him . . .." Appellee's Br., p. 3. The fact is that Mr. Jennings could not identify the appellant as his assailant. (Tr. 26-27)

ARGUMENT

I. THE TRIAL JUDGE'S INSTRUCTION ON CORROBORATION SHOULD BE REVIEWED UNDER RULE 52(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

It is true, as the appellee says, that the appellant's counsel did not object to the instruction to the jury that it could treat as corroborative of rape the evidence that, shortly after the alleged offense, spermatozoa were found in the vagina of the prosecutrix. But under Rule 52(b) of the Federal Rules of Criminal Procedure the instruction should be reviewed here because it was a "plain error" or a defect "affecting substantial rights" of the appellant.

This Court has applied Rule 52(b) to review defects in instructions despite absence of objection. Godfrey v. United States, 122 U.S. App. D.C. 285, 353 F.2d 456 (1966); Surratt v. United States, 106 U.S. App. D.C. 49, 269 F.2d 240 (1959); Payton v. United States, 96 U.S. App. D.C. 1, 222 F.2d 794 (1955); Tatum v. United States, 88 U.S. App. D.C. 386, 190 F.2d 612 (1951).[1/]

1/ The cases cited in n. 9 on page 9 of Appellee's Brief are all short per curiam opinions dealing with situations where this Court held that review of an erroneous instruction under Rule 52(b) was not appropriate. In two of these cases this Court concluded that the error was not sufficiently significant in the circumstances of the case to merit reversal.
(Footnote continued)

The Rule should be so applied in this case.

That the instruction was erroneous is obvious. The appellee's own evidence showed that spermatozoa could be found in a woman's vagina for some 72 hours after intercourse. Hence that spermatozoa were in the vagina of the prosecutrix late in the morning when she was living with her husband could not possibly be corroborative of her being raped by another man earlier that morning. Appellant's counsel so contended in the motion for acquittal. (Tr. 175) Thus the pertinent facts were fully developed -- there was no uncertainty as in Gray v. United States, 114 U.S. App. D.C. 77, 311 F.2d 126 (1962), cert. denied, 374 U.S. 838 (1963). The right of the appellant that was affected certainly was substantial; in the case of a crime such as rape the requirement of corroboration

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(Footnote continued)
Engram v. United States, 117 U.S. App. D.C. 30, 325 F.2d 226 (1963) (failure of trial judge during instruction to strike an isolated reference to an inculpatory statement not attributed to the defendant Engram); McAllister v. United States, 90 U.S. App. D.C. 256, 239 F.2d 76 (1956) (statement during instruction that "to reach a verdict . . . should not involve any difficulty"). In another of these cases the defendant attacked a statement in the instruction which accurately reflected the stated theory of the defense at trial. Richardson v. United States, 119 U.S. App. D.C. 212, 338 F.2d 552 (1964). In the other of these cases the opinion does not disclose the substance of the defendant's objection to the instruction on appeal. Fisher v. United States, 118 U.S. App. D.C. 165, 334 F.2d 555 (1964).

is a most important protection to the accused. To instruct a jury that the presence of spermatozoa can be corroborative is particularly prejudicial, for it would appear to unsophisticated jurymen to be "scientific" and objective evidence whereas in the circumstances it was in fact not probative to any degree. The prosecuting attorney specifically relied on this so-called evidence in his argument to the jury. Appellant's Br., pp. 36-37. And the offense charged was a capital crime, requiring special care that any conviction be free of error. Tatum v. United States, 88 U.S. App. D.C. at 388, 190 F.2d at 614; and see Hamilton v. Alabama, 368 U.S. 52 (1962).

II. ADMISSION OF EVIDENCE SECURED IN VIOLATION OF THE APPELLANT'S RIGHT TO COUNSEL'S PROTECTION SHOULD BE REVIEWED UNDER RULE 52(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

It is true, as the appellee says, that the appellant's counsel did not object to the admission of or move to strike testimony by the prosecutrix that she had identified the appellant at a lineup. But under Rule 52(b) of the Federal Rules of Criminal Procedure admission of that evidence should be reviewed here because it was a "plain error" or a defect "affecting substantial rights" of the appellant.

The error in allowing this testimony arises from facts made altogether clear on the record. The appellant's counsel had requested the police that she be notified so that she could be present at the lineup, and appellant had wanted his counsel to be present (Tr. 264-271); moreover there was no suggestion that it would have been inconvenient in the least to the authorities to have allowed counsel to be present. Yet the lineup was held without notification to the appellant's counsel. Indeed the police made it clear that they would not notify counsel whether or not there was a request for such notification. (Tr. 308) The prosecutrix's identification of the appellant at the lineup was a significant factor in her testimony that the appellant was the guilty man.

In two cases, despite absence of objection at the trial, this Court dealt with the merits of the question whether the right to counsel included the right to have counsel in connection with pretrial identification. Kennedy v. United States, 122 U.S. App. D.C. 291, 353 F.2d 462 (1965); Williams v. United States, 120 U.S. App. D.C. 244, 345 F.2d 733 (1965), cert. denied, 382 U.S. 962 (1965).[2/]

2/ Objection had not been made at the trial in these cases. See Brief for Appellee in the Williams case, pp. 11-12; Brief for Appellee in the Kennedy case, p. 5.

So it should be in this case.

The facts were developed at the trial, and the trial judge was told by appellant's counsel that she "had a right to be present at the lineup." (Tr. 265) There is no uncertainty as to the facts as in Gray v. United States, supra. The right to the assistance of counsel -- constitutional in its proportions -- surely is substantial within the meaning of Rule 52(b). See United States v. Smith, 353 F.2d 166, 168 (4th Cir. 1965). Moreover, the lineup identification had a direct bearing on the force of the only eyewitness testimony as to the appellant's identity. Finally, the case involves a charge of capital crime. Tatum v. United States, supra.

III. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER, TO INSURE FAIR ADMINISTRATION OF JUSTICE, IN VIEW OF RECENT SUPREME COURT DECISIONS.

On June 12, 1967, the Supreme Court decided that an accused has a constitutional right to counsel at a lineup. United States v. Wade, No. 334; Gilbert v. California, No. 223. The Court declined, however, to make its holding retroactive. Stovall v. Denno, No. 254. This Court nevertheless, under its supervisory powers over the administration of justice in the District of Columbia, may apply the standards

pronounced in Wade and Gilbert, and it should do so. See Tate v. United States, 123 U.S. App. D.C. 261, 286, 359 F.2d 245, 252 (1966). It is clear, in the instant case, that appellant's lawyer had requested the opportunity to attend the lineup, but was refused. It is also clear that the prosecutrix's testimony concerning the lineup itself was particularly damaging to appellant's defense -- yet the appellant's counsel had no alternative to the eliciting of such testimony on cross-examination. In view of the rationale underlying the decisions in Wade and Gilbert and the holdings therein, it is submitted that the facts of this case compel a similar result under the standards of "fair administration of criminal justice within the District of Columbia" which this Court is charged to safeguard. Tate v. United States, supra.

The Court need go no further in this case than to rule on the situation where counsel's request for an opportunity to attend a lineup was ignored -- a situation

not involved in Williams v. United States, 120 U.S. App. D.C. 244, 345 F.2d 733 (1965) -- nor need it determine the extent if any to which its ruling should be retroactive.

Respectfully submitted,

/s/ Howard C. Westwood
HOWARD C. WESTWOOD

701 Union Trust Building
Washington, D. C. 20005

Attorney for Appellant
(By Appointment of this Court)

Of Counsel:

T. ROGNALD DANKMEYER, JR.

COVINGTON & BURLING

701 Union Trust Building
Washington, D. C. 20005

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of June, 1967, he has served the foregoing Reply Brief for Appellant on the United States Attorney by causing two copies thereof to be delivered to David G. Bress, United States Attorney, United States Courthouse, John Marshall Place, Washington, D. C.

/s/ Howard C. Westwood
HOWARD C. WESTWOOD

701 Union Trust Building
Washington, D. C. 20005

MEMORANDUM SUPPLEMENTAL TO REPLY BRIEF FOR APPELLANT

In The

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

Ernest S. Borum, Appellant,

v. No. 20,270

United States of America, Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HOWARD C. WESTWOOD
701 Union Trust Building
Washington, D. C. 20005

Attorney for Appellant
(By appointment of this Court)

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

Ernest S. Borum, Appellant, v. United States of America, Appellee.	)	No. 20,270

MEMORANDUM SUPPLEMENTAL TO REPLY BRIEF FOR APPELLANT

This supplemental memorandum is directed to the bearing on this case of United States v. Wade (No. 334), Gilbert v. California (No. 223), and Stovall v. Denno (No. 254), decided by the Supreme Court on June 12, 1967.

Wade held that the Constitution requires that an accused have an opportunity to have counsel present at a pre-trial lineup and that, where the accused has been identified in court by a witness who, prior to trial, had identified him at a lineup, and where notice of the lineup had not been given to the accused's counsel, the conviction will be vacated pending a hearing to determine whether the in-court identification was altogether independent of the lineup identification.

Gilbert held that where an identifying witness testifies on examination by the State that he had identified the accused at a lineup of which the accused's counsel had no notice the Constitution requires that there be a new trial, unless the error was "harmless beyond a reasonable doubt." See slip opinion, pp. 9-10.

Stovall held that the Constitution rules established in Wade and Gilbert would apply only to cases wherein lineups were held subsequent to those decisions.

* * *

The Supreme Court has to apply a Constitution for the varying circumstances of 50 States, the Federal and Territorial jurisdictions, and the District of Columbia. In doing so it must take care not unduly to disrupt the entire administration of the criminal procedure of these varying governments. Hence the restraint of Stovall; cf. Cicenia v. Lagay, 357 U.S. 504, 508-510 (1958).

But the limits to a Constitutional right as defined by the Supreme Court do not prevent a State from giving a broader right to those with whom its law deals. Johnson v. New Jersey, 384 U.S. 719, 733 (1966). Similarly this Court, in discharging its responsibility for the

administration of justice in the District of Columbia, is not confined to the perimeters of the Constitutional rights for the whole country as they may be defined by the Supreme Court; it may fashion stricter standards for the District of Columbia because "Matters relating to law enforcement in the District are entrusted to the courts of the District." Fisher v. United States, 328 U.S. 463, 476 (1946); see also Griffin v. United States, 336 U.S. 704, 712-715 (1949); cf. Cicenia v. Lagay, supra, at 508-509.

* * *

If this case had reached decision prior to June 12 it would have been open to this Court to have recognized and applied to it a Wade/Gilbert right. Enlightened as this Court has been not only by its own increasing perceptions of the rights of the accused but also by the Supreme Court's elaboration thereof in its landmark decisions of recent years, it is at least likely that, in a decision herein prior to June 12, this Court would have anticipated the Wade/Gilbert holdings. It should apply them now. Surely this Court is not prepared to say that the jurisdiction of the Nation's Capitol was more niggardly in its grant of rights to an accused and his counsel on June 12 than Wade/Gilbert require for all

jurisdictions thereafter, at least in a case where, as here, those rights have been invoked by the accused and his counsel from the beginning.

* * *

But the decision of the Supreme Court in Stovall, denying retroactive application of Wade/Gilbert, did not deal with a wrong as gross as that in this case. In Stovall, the Supreme Court was faced with a problem not unlike that in Williams v. United States, 120 U.S. App. D.C. 244, 345 F.2d 733 (1965). In Stovall at the time of the pre-trial identification the accused did not yet have counsel. So in Williams.

Actually in Williams this Court was concerned with the question whether at the time of a lineup there had yet attached any duty at all to provide counsel to an accused. It did not focus on the question of the obligation of the government to an accused and his counsel when the counsel is already acting and is affirmatively seeking to extend his assistance to his client.

Here, unlike the situation in Williams, the client wanted his counsel present at the lineup and so informed the lineup officer. (Tr. 267) He realized his

own helplessness without his lawyer's observation of the lineup. (Tr. 268) And prior thereto, when he turned himself in accompanied by his counsel the evening before, his counsel in his presence had requested to be notified of the lineup and had given the officer her card, with her office and home telephone number, so that she could be notified. (Tr. 265-266, 307) The accused feared that the lineup was being rigged; that was why he wanted his lawyer. (Tr. 268-271; cf. Tr. 284-286)

The government does not deny that counsel thus sought to be present and admits that counsel was not notified. (Tr. 109; see also 265) The lineup was a regular, indeed allegedly a routine, lineup at 8:30 a.m. on a Wednesday. (Tr. 108-111) It would have presented no problem whatever for the police to have notified counsel.

Here, then, the wrong alleged is not that the government did not take the steps affirmatively to provide counsel as in Williams (or Stovall). Here all that the government had to do was to make a simple phone call to a number that counsel had given to the police the evening before when she made her request. Deliberately the government in this case affirmatively refused to permit counsel to take steps to protect her client that that counsel was seeking to take. Cf. Escobedo v. Illinois, 378 U.S. 478 (1964); Cicenia v. Lagay, supra, at 508-509.

Stovall, no more than Williams, did not hold that such an affirmative interference by the government with the discharge by counsel of his service to his client is to be remedied only in futuro. We submit that in the District of Columbia, where it has been recognized even by Congress that counsel should be provided "as early in the proceeding as practicable," D.C. Code § 2-2202 (1961), no such obstacle to retained counsel's service should be tolerated, particularly when there is not the slightest suggestion of any reason whatsoever that the phone call could not have been made or that the least inconvenience to the police and their procedure would have been caused.

After June 12 it is a wrong for the government not to provide counsel and affirmatively seek him out to give him an opportunity to attend a lineup. Surely it was a wrong in the District of Columbia on June 12 and theretofore for the government deliberately to have frustrated counsel's own effort to attend such a critical event. The lineup here occurred on July 7, 1965, more than a year after the decision in Escobedo v. Illinois, supra. Certainly in this jurisdiction it could not have been blithely assumed, with warrant, by the government that, after Escobedo, this Court

would tolerate such frustration of counsel's efforts to be at her client's side. It is not without significance that the majority of this Court in Stith v. United States, (No. 20,007, January 24, 1967), emphasized that there it was "undisputed that he [the appellant] had made no request for counsel." Slip opinion, pp. 2-3. And see Jackson v. United States, 114 U.S. App. D.C. 100, 103-104, 337 F.2d 136, 140-141 (1964). See also Cicenia v. Lagay, supra, at 508-509.

* * *

It was held in Gilbert that when the State adduces evidence that the identifying witness identified the accused at a lineup there must be a new trial unless the error was "harmless beyond a reasonable doubt." Gilbert, supra.

The rationale of that holding calls for a new trial in this case.

The defense here was alibi. Identification was critical to the government's case. Two of the three eyewitnesses to the episode could not identify the accused. Only the third, Mrs. Clarke, purported to do so. Immediately after the episode she had described the man as a five foot six (Tr. 63) dope addict. (Tr. 32, 71-72)*/

*/ Her reference to him as a dope addict was based on what the man told her during the episode. (Tr. 71; see also Tr. 38, 47)

In fact the accused was six feet one (Tr. 302) and was not a dope addict. (Tr. 287) At the preliminary hearing she had testified that she had identified him at a lineup held three days theretofore; only after her husband corrected her did she return to the stand to testify that she had identified him not at the lineup she had attended three days before but at a lineup held only a couple of hours before the hearing. (Tr. 65-66)

Thus it was important to the government's case that the credibility of this witness should be established as firmly as possible. It is notable, then, that in his opening statement to the jury the prosecutor said,

> "He was positively identified in a lineup by Mrs. Clarke as the man who was in the premises and committed these various crimes, including raping her." (Tr. 13) (Emphasis added)

Having told this to the jury in the opening statement, it was hardly necessary for the prosecutor to refer to the lineup in his questioning of Mrs. Clarke on direct and he did not do so; obviously the lineup issue would be brought up on cross, as indeed it was. The prosecutor then questioned Mrs. Clarke about her lineup identification on redirect. (Tr. 76-76) Again and again during the trial the matter of the lineup was brought up, including

questions concerning it in the prosecutor's direct examination of the principal police witness who was asked whether Mrs. Clarke attended a lineup "in connection with this case" and who stated that she had. (Tr. 107)

In short in the jury's mind, from the opening statement of the prosecutor on through the trial to and including rebuttal witnesses, the circumstances of the lineup and the witness's identification of the accused at the lineup, and at which of two lineups, received great emphasis -- far more emphasis, in fact, than her "independent" in-court identification.

That this error was not "harmless beyond a reasonable doubt" is patent. The only other identification was fingerprint identification. There allegedly were fingerprints of the accused on two different papers allegedly found on the premises. One carried a publication date two weeks after the crime -- and the prosecution made no effort to explain in its evidence this extraordinary discrepancy in dates. (Tr. 344) A blow-up of this print was tendered in evidence. The other was on an envelope that had been on the premises for a year before the crime; but the prosecution did not tender a blow-up of this print in evidence, contenting itself with the merest conclusory testimony of its police expert. (Tr. 159-160)

In these circumstances the fingerprint evidence alone might well have left a reasonable doubt in the jury's mind. Hence it is little wonder that the prosecution so strongly emphasized throughout the case the eyewitness's identification and her credibility.

In addition to all else, it is submitted that the police's failure to honor the request of appellant's attorney to be present at the lineup constitutes a denial of due process under the Fifth Amendment particularly where, as here, appellant feared that the lineup would be rigged.

In Crooker v. United States, 357 U.S. 433 (1958), in which the repeated requests of the accused to be allowed to contact an attorney were denied, the Supreme Court refused, by a bare majority, to adopt an absolute rule that any denial of a request to contact counsel infringed the Constitutional right to due process. Instead it looked to the circumstances of each case to determine the fundamental fairness of the trial in the light of the denial. See also Cicenia v. Lagay, supra. But Escobedo overruled Crooker and Cicenia to the extent the latter were inconsistent; so the present force of the bare majority's decision in Crooker is not clear.

In any case, here the record shows that the accused wanted his counsel present at the lineup (and she sought to be present) because of his fear that it would be rigged and his own helplessness to protect himself. Indeed at the trial itself the evidence presented a familiar problem of charges by the accused that the police had conducted an unfair lineup and even had indicated an intention to make the charges against him stick regardless of their merit. (Tr. 268-271) These charges were denied by the police witnesses. (Tr. 111-113) It is obvious that where there is such a controversy an accused at the lineup, in the glare of lights, with the room full of people, has little chance. In such circumstances, if ever, the protection of counsel's presence is essential to fairness.

* * *

Finally, even the five Justice majority in Cicenia made it clear that interference with counsel's efforts to protect his client would not be tolerated were the case one involving the Court's power "over the administration of justice in the federal courts" as distinguished from a due process question. Cicenia v. Lagay, supra, at 508-509. In

the present case, whether or not the wrong violated due process, we submit that it was one to be righted as a matter of proper administration of justice in this jurisdiction.

Respectfully submitted,

HOWARD C. WESTWOOD

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23d day of June, 1967, he has served the foregoing Memorandum Supplemental To Reply Brief For Appellant on the United States Attorney by causing two copies thereof to be delivered to David G. Bress, United States Attorney, United States Courthouse, John Marshall Place, Washington, D. C.

HOWARD C. WESTWOOD

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Ernest S. Borum,
Appellant,

v.

United States of America,
Appellee.

No. 20,270

PETITION FOR REHEARING

Appellant, Ernest S. Borum, by his counsel, Howard C. Westwood, requests a rehearing by the panel or, in the alternative, a rehearing en banc on his appeal from a conviction for rape, robbery and assault with a dangerous weapon.

Appellant submits that the opinion of the panel of this Court dated December 21, 1967 requires reconsideration in two respects: (1) with regard to the corroboration required to support a rape conviction it erroneously concludes that noncorroborative evidence becomes corroborative because of the presence of other corroborative evidence and

the present case, whether or not the wrong violated due process, we submit that it was one to be righted as a matter of proper administration of justice in this jurisdiction.

Respectfully submitted,

HOWARD C. WESTWOOD

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23d day of June, 1967, he has served the foregoing Memorandum Supplemental To Reply Brief For Appellant on the United States Attorney by causing two copies thereof to be delivered to David G. Bress, United States Attorney, United States Courthouse, John Marshall Place, Washington, D. C.

HOWARD C. WESTWOOD

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Ernest S. Borum,
Appellant,
v.
United States of America,
Appellee.

No. 20,270

PETITION FOR REHEARING

Appellant, Ernest S. Borum, by his counsel, Howard C. Westwood, requests a rehearing by the panel or, in the alternative, a rehearing en banc on his appeal from a conviction for rape, robbery and assault with a dangerous weapon.

Appellant submits that the opinion of the panel of this Court dated December 21, 1967 requires reconsideration in two respects: (1) with regard to the corroboration required to support a rape conviction it erroneously concludes that noncorroborative evidence becomes corroborative because of the presence of other corroborative evidence and

(2) with regard to the placing of appellant in a lineup without the assistance of counsel it ignores the critical difference in constitutional law between the duty of the state to provide counsel to an accused and the duty of the state to honor reasonable requests by counsel already acting on behalf of the accused.

I.

The evidence revealed the presence just after the rape of spermatozoa in the vagina of the complainant. It further revealed that the complainant was a married woman living with her husband and that the spermatozoa could have been deposited up to 72 hours prior to its discovery.

The trial court instructed the jury that corroboration of the complainant's testimony was essential to a conviction for rape and that the evidence relating to the spermatozoa, as well as other evidence, could be considered corroborative. Appellant contends that this instruction was erroneous in that the evidence of the presence of spermatozoa did not satisfy the corroboration requirement.

Since the spermatozoa could as well have resulted from intercourse with the complainant's husband as from the

alleged rape, that evidence standing alone was not sufficient to satisfy the corroboration requirement. The panel does not conclude otherwise. In fact the panel apparently recognizes the noncorroborative quality of this evidence when it describes it as "ostensibly impartial when seen in isolation." Slip Opinion at 8.

The panel points to other unrelated evidentiary items which could have been considered corroborative and concludes that in the context of these other evidentiary items the presence of spermatozoa itself becomes corroborative.

What the panel fails to do, and what the record in this case prevents it from doing, is to point to other evidence which negates the impartiality of this evidence and thus establishes its corroborative quality. No evidence was introduced at the trial to connect the spermatozoa with appellant or with the alleged rape or otherwise to negate the inference that it resulted from intercourse with the complainant's husband.

None of the other evidence said by the panel to be corroborative fills this void. This other evidence merely furnishes corroboration from other sources.

The panel is apparently straining to rationalize a harmless error determination which is untenable.*/ It is untenable because there is no way to determine on which evidence the jury relied in deciding that the corroboration requirement was met. The jury may have believed, of all the evidentiary items included in the corroboration instruction, only the evidence of the presence of spermatozoa and may have erroneously concluded that this evidence alone satisfied the corroboration requirement.**/

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*/ In this connection it should be noted that the Supreme Court's decision cited by the panel in footnote 22 in support of a very liberal relevancy test, which the panel concluded applied to the corroboration requirement, is actually based on a harmless error determination. Just below the language quoted by the panel, the Supreme Court says: "Courts of error are specially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused." Holmes v. Goldsmith, 147 U.S. 150, 164 (1893) (Emphasis added.) The same is true of Smith v. United States, 267 Fed. 665 (8th Cir. 1920), cited in the same footnote; in Smith the court explicitly denied making a relevancy determination because of the harmlessness of the evidence involved.

**/ This possibility points up the fallacy in the panel's conclusion that satisfaction of a relevancy test for admissibility has the effect of satisfying the corroboration requirement. Furthermore, inclusion of this evidence in the corroboration instruction without caveat as to its limited probative value might well have caused the jury to give it more weight than it deserved.

The panel recognizes that a harmless error theory is inapplicable to this situation when it explicitly denies suggesting "that adequate corroboration from other sources would cure error in an instruction improperly authorizing consideration of a particular item of proof . . .." Slip Opinion at 9.

The error in this regard was particularly prejudicial for unsophisticated jurymen may well have attached considerable importance to this evidence because of its scientific nature and because of the repeated references to it by the prosecutor. In addition such evidence is quite likely to have an inflammatory impact on the jury.

II.

When appellant surrendered to the police, his trial counsel told a police officer that she wished to be present at the lineup, requested that she be notified of its time, and gave him her card. Appellant testified that he was apprehensive that the lineup might be conducted unfairly and therefore wanted his counsel to be present. Without notice to appellant's counsel and without her being present, appellant was placed in a lineup and identified by the rape complainant. At the trial this complainant identified appellant and also testified to her prior lineup identification.

Appellant in this appeal contends that the conduct of the lineup in these circumstances deprived him of his constitutional rights to counsel and to due process, and in addition should not be tolerated as a matter of the proper administration of justice. While this appeal was pending, the Supreme Court held that the Sixth Amendment required the assistance of counsel at a pretrial lineup. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967). In a companion case the Supreme Court stated that as a matter of constitutional law this new ruling need not be applied to lineups conducted prior to the date of these decisions. Stovall v. Denno, 388 U.S. 293 (1967).

These decisions deal with the duty of the state to provide an accused with the assistance of counsel at a pre-trial lineup and do not deal with the different question of the duty of the state to honor a reasonable request by counsel, already acting on behalf of the accused, that she be allowed to be present at such a lineup.

The panel ignored this important distinction when it followed its prior decisions denying retroactive application of the Wade rule. An examination of the criteria used

by the Supreme Court in Stovall demonstrates that in this case the Wade rule should be applied retroactively.

In Stovall the Supreme Court stated that the purpose of the Wade rule was to prevent unfairness at a pretrial confrontation and that this unfairness went to the very reliability of the fact-finding process. Against the probability that nonretroactive application of Wade would prejudice the rights of some convicted persons were weighed the justified reliance of law enforcement authorities on the prior rules and the adverse impact of retroactivity upon the administration of justice. Finding both these factors very substantial, the Supreme Court concluded that courts were not constitutionally compelled to apply Wade retroactively.

But this case is different. These other factors are not substantial here, and therefore Wade should be applied retroactively where the issue is the failure of the state to honor counsel's reasonable request to be present at the lineup.

At the time of the trial in this case the police could hardly claim reasonable reliance on an established legal principle when they apparently ignored the request of appellant's counsel. To the contrary, the Supreme Court's

much-publicized decision in Escobedo v. Illinois, 378 U.S. 478 (1964), more than a year prior to the lineup in this case,*/ made it clear that with respect to an interrogation the police may not frustrate the attempt of counsel to assist his client. In that case, like this one, counsel was present at the police station and both counsel and the accused requested an opportunity to consult. And this Court has recognized the importance of these facts when it relied on them as a basis for distinguishing Escobedo from subsequent cases one of which involved a lineup.**/

Likewise, the effect on the administration of justice of the application of the Wade principle to this case would be minimal for it is unlikely that more than a handful of lineup cases would have involved the failure of the police to honor requests by counsel similar to those in this case.

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*/ Escobedo was decided on June 22, 1964. The lineup in this case was held on July 7, 1965 and the trial in May, 1966. Thus the Escobedo ruling was clearly applicable to this case. Johnson v. New Jersey, 384 U.S. 719 (1966).

**/ Fuller v. United States, No. 19,532 (November 20, 1967) at 16-17; Stith v. United States, No. 20,007 (January 24, 1967) at 3; Kennedy v. United States, 122 U.S. App. D.C. 291, 293, 353 F.2d 462, 464 (1965) (lineup); Jackson v. United States, 119 U.S. App. D.C. 100, 103-104, 337 F.2d 136, 140-141 (1964).

Appellant need not rely on the application of Wade to this case. Even if the Wade case does not apply or even if the Supreme Court had decided Wade the other way, appellant should still prevail on this appeal because there are no interests which override the need to prevent the police from frustrating the efforts of his counsel to protect his rights.

In this case the burden of compliance on the police is minimal; the police had only to telephone appellant's counsel. And the presence of counsel at the lineup would hardly have an adverse effect on law enforcement.*/

No substantial interest of the state supports the panel's decision upholding the conduct of the police in this case. To the contrary, our legal system depends for the protection of the rights of an accused upon the efforts of counsel; for this reason frustration of such efforts by the police must not be tolerated.

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*/ Since the privilege against self-incrimination does not justify a refusal to participate in a lineup (See Schmerber v. California, 384 U.S. 757, 760-764 (1966); Kennedy v. United States, 122 U.S. App. D.C. 291, 295, 353 F.2d 462, 466 (1965)), the impact on effective law enforcement of the presence of counsel would be significantly less at a lineup than at an interrogation.

Permitting such interference with counsel's efforts to protect his client will lead inevitably to a loss of respect for the law. Appellant is a good example. Fearing unfair treatment at the hands of the police, he did just what our legal system contemplates to protect his rights. He retained counsel. And his counsel discharged her duty by accompanying him to the police station where he surrendered and by requesting notice of the time of the lineup so that she could be present. But her request was ignored; appellant was placed in a lineup and later convicted as a result of the identification testimony quite probably affected by the lineup. It is obvious that this chain of events must substantially diminish appellant's belief in the fairness of our legal system.

This is not to say, as the panel suggests, that appellant should be preferred over others because he was able to afford to retain counsel. It is rather to say that, where the issue is the failure of the state to honor reasonable requests of counsel, the interests to be weighed in making the decision are different from where the issue is the duty of the state to provide counsel. This difference applies with

equal force whether the request is made by appointed counsel or by retained counsel.*/

Regardless of constitutional requirements, the considerations stated above require, as a matter of proper administration of justice in the Federal courts, that this Court not permit the frustration by the police of counsel's efforts to protect her client. See Cicenic v. Lagay, 357 U.S. 504, 508-509 (1958).

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*/ The decisions requiring equal treatment for indigents and non-indigents in criminal cases, cited by the panel in footnote 14, are thus not applicable. Nor is the principle that the right to counsel does not depend on the assertion of the right by the accused. Carnley v. Cochran, 369 U.S. 506 (1962) In this case it is not appellant's assertion of his right to counsel but rather the presence of counsel, her efforts to protect her client and the frustration by the police of this effort which are the critical elements.

For the reasons stated herein, appellant requests that this Petition for Rehearing be granted.

HOWARD C. WESTWOOD
701 Union Trust Building
Washington, D. C. 20005

Attorney for Appellant
(By Appointment of this Court)

Of Counsel:

T. ROGNALD DANKMEYER, JR.

COVINGTON & BURLING

701 Union Trust Building
Washington, D. C. 20005

February 2, 1968

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

HOWARD C. WESTWOOD

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2d day of February, 1968, he has served the foregoing Petition for Rehearing on the United States Attorney by causing two copies thereof to be delivered to David G. Bress, Esq., United States Attorney, United States Courthouse, John Marshall Place, Washington, D. C.

HOWARD C. WESTWOOD
701 Union Trust Building
Washington, D. C. 20005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,270
(Cr. No. 942-55)

ERNEST S. BORUM, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

OPPOSITION TO PETITION FOR REHEARING

Introduction

Pursuant to the request of the Court, we file this opposition to appellant's petition for rehearing before the sitting division or, in the alternative, before the Court en banc.

Appellant was tried before a jury and found guilty of one count of housebreaking, one count of robbery, one count of rape, and three counts of assault with a dangerous weapon, all counts stemming from one episode occurring on the morning of June 14, 1965 at a residence occupied by Mrs. Lucy Wilson in Southeast Washington. In his petition for rehearing, appellant contends, first, that the trial court committed plain error under the circumstances of this case in instructing the jury that it could consider, among other things, "medical testimony . . . as to the presence of spermatozoa in [the victim's] vagina" as corroboration of the victim's testimony that she had been raped. He contends, second, that it was plain error to admit the rape victim's identification testimony insofar as such testimony related to or was based on her extra-judicial

identification of appellant in a pre-Wade lineup where appellant's counsel requested that she be informed when a lineup would be held and expressed her desire to be present but was not so informed and was not present.

For the convenience of the Court, we shall set forth in some detail the evidence relevant to each of these issues.

ARGUMENT

I

Mrs. Clarke lived next door to the residence occupied by Mrs. Wilson (Tr. 35). On the morning of June 14, 1965, while resting in her home, Mrs. Clarke heard someone moaning in Mrs. Wilson's residence (Tr. 36-37). Thinking Mrs. Wilson might be in need of help,[1/] Mrs. Clarke went next door to investigate. Upon entering through a door leading into the kitchen, she saw Mrs. Wilson in a sitting position facing the kitchen, blood streaming down her shoulders, her hair in dissarray.[2/] An intruder, identified by Mrs. Clarke as appellant, was standing over Mrs. Wilson gagging her. (Tr. 37-38.) Upon seeing Mrs. Clarke, appellant, who was armed with a pistol, ordered her to a sofa and to remove all her clothing, which she did (Tr. 38). He then directed her to lie on her back (Tr. 45-46). Mrs. Clarke complied. When appellant's

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1/ Mrs. Wilson was 80 years old at time of trial (Tr. 43).

2/ (See following page)

attempt to have intercourse with Mrs. Clarke failed, he threatened to kill Mrs. Wilson (Tr. 46). After Mrs. Clarke asked him not to carry out his threat, he ordered her to accompany him into a back room where appellant had bound Mr. Jennings.[3/] Appellant checked Mr. Jennings to be sure he was still securely bound and then ordered Mrs. Clarke to lie down in the hall. From this point appellant could see both Mrs. Wilson and Mr. Jennings. (Tr. 47-48.) There in the hall appellant had intercourse with Mrs. Clarke (Tr. 48). Upon completing the act, he told Mrs. Clarke, "Go wash yourself" (Tr. 49). Mrs. Clarke went to the kitchen where after using her underpants as

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2/ (From previous page)

Mrs. Wilson testified that Mrs. Clarke came through the back door as the intruder was trying to tie her feet (Tr. 42). She said the intruder, upon seeing Mrs. Clarke, asked, "What are you doing here?" and, as Mrs. Wilson put it, "he didn't pay much attention to me any more then and took her on" (Tr. 43).

Mr. Jennings, who was bound and gagged in a back room, heard someone enter the house and say "Mrs. Wilson", to which the intruder replied, "All right, this way. Let's go" (Tr. 22). The woman inquired, "Let's go where?" and the intruder answered, "I am going to have to tie you up" (Tr. 22).

Mr. Jennings worked for a laundry service and on the morning of June 14, 1965, was servicing Mrs. Wilson's residence. Upon standing at the front door and calling out that he was the laundry man, he was greeted by the intruder, who was armed with a pistol. With the intruder standing to his rear holding a pistol to his back, Mr. Jennings was directed to a back bedroom where he was robbed, bound and gagged. (Tr. 16-23.) This is where he was lying when he heard Mrs. Clarke enter Mrs. Wilson's residence.

3/ See supra 2, note 2.

a wash cloth, she threw them to the floor. (Tr. 49.) Appellant then directed her to the sofa in the living room, made her lie down on her stomach, tied her legs together and hands behind her back, and gagged her with her slip (Tr. 49). He then left the premises (Tr. 49).

Mrs. Clarke was able to roll off the sofa, untie herself and lock the front door (Tr. 49). She found Mrs. Wilson in a daze trying to dial the telephone (Tr. 49). She tended to Mrs. Wilson and, still completely nude, called the Fire Department Headquarters where her husband was employed. (Tr. 49-50). She reported, "A woman has been beaten up and a man tied up, and I have been raped" and requested an ambulance, a doctor and the police (Tr. 50-51).

In the meantime, Mr. Jennings had gotten loose, had walked by Mrs. Clarke and was sitting in the front room and looked as if he was in a daze (Tr. 51).[4/]

4/ Mr. Jennings testified as follows (Tr. 24):

> Well, I got loose myself when I didn't hear any commotion or anything. I judged the man had left. I drawed my feet up behind me enough to get my hand in the loop around my feet and stretched it enough to get one foot out and then I got the other foot out. So then I turned on my side to try to get my hands around something to get them untied and I saw Mrs. Clarke standing in the doorway, and she was completely nude and she had the telephone in her hand.
>
> She glanced around and she saw me. I had sort of a side view. When she turned around, she saw me getting loose. She said, "Lock the back door so he can't get back in."
>
> And she was on the phone trying to get the Police Department and she was hysterical, crying. She finally got them.

After making several calls, Mrs. Clarke dressed (Tr. 51). Shortly thereafter the police arrived followed by Mrs. Clarke's husband (Tr. 53). After telling the police of the morning's incident, she went home with her husband, got fully dressed and went to the office of her doctor, Dr. Terrafranca.

Dr. Terrafranca examined Mrs. Clarke's pelvic area and made smears which he took to Dr. Morales at Providence Hospital for analysis (Tr. 78-80, 82). He said Mrs. Clarke was tense and upset and that her blood pressure was up (Tr. 81-82). Dr. Morales testified that he took the smears delivered to him by Dr. Terrafranca and gave them to a pathology lab technician who examined them and reported to him that that they contained spermatozoa (Tr. 84). He said he then examined the smears himself and corroborated the technician's findings (Tr. 84).

On cross-examination, Dr. Morales acknowledged that spermatozoa may remain in the vagina for a period of up to 72 hours (Tr. 86-87).

Subsequently, the Government introduced into evidence Mrs. Clarke's underpants worn the morning of the offense and used by her as a washcloth after the rape.

It was stipulated by counsel that spermatozoa was found on the underpants (Tr. 115-117).

The trial judge instructed the jury as follows (Tr. 410-411):

> Now, the law does not permit the establishment of the crime of rape on the basis of the

testimony of the complaining witness alone, in this case Mrs. Clarke. Her testimony must be corroborated by other evidence. Such corboration, however, need not be by eyewitnesses. Eyewitnesses can hardly ever be obtained in regard to such an offense as is charged in this case, the charge of rape.

It is your responsibility as jurors to determine if there are corroborating circumstances which support the testimony of Mrs. Clarke. In determining whether Mrs. Clarke's testimony was in fact corroborated, you may consider all the facts and circumstances surrounding the alleged assault as, for example, whether or not she promptly made a complaint, the medical testimony of her family doctor, the medical testimony of Dr. Morales, the pathologist, as to the presence of spermatozoa in her vagina, the stipulated testimony that spermatozoa was found on her underclothing, the testimony of Ralph Jennings that she was completely nude when viewed by him and while telephoning to the police, any and all other circumstances which appear in the testimony which might tend in your mind to corroborate her statements. It is for you to determine whether these and other items that you may wish to consider are of such corroborative weight and value as to satisfy the legal requirement of corroboration wholly apart from the testimony of Mrs. Clarke.

Appellant argues that the trial judge erred when he instructed the jury that it could consider, among other things, the "medical testimony . . . as to the presence of spermatozoa in her vagina"as corroborating Mrs. Clarke's testimony that she had been raped. He contends that since Mrs. Clarke was married and living with her husband and since it was established that spermatozoa might live in the vagina for a period of up to 72 hours, the presence of spermatozoa in her vagina was a neutral fact for it was never established that Mrs. Clarke did not have sexual relations with her husband 72 hours before her examination.

We view appellant's argument as challenging the relevance of the medical testimony on the issue of corroboration under the circumstances of this case. The sitting division answered appellant's argument after an extensive review of the applicable authorities and the evidence in this case, concluding (Slip op. at 9-10):

> Even where the effort is to prove a fact, rather than less arduously to corroborate testimony, "[t]he competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if there may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth." [Footnote omitted]. As Dean Wigmore has put it, "the general and broad requirement for relevancy is that the claimed conclusion from the offered fact must be a possible or a probable or a more probable hypothesis, with reference to the possibility of other hypotheses." [Footnote omitted].
>
> We think it clear that no more is required when the call is to place "circumstances in proof which tend to support the prosecutrix's story," [Footnote omitted] and we think that the circumstance under scrutiny possessed a capability in that direction.

Appellant's attack on this portion of the sitting division's opinion is premised on the mistaken assumption that the test for the relevance of a corroborative fact is the same as the test for determining the sufficiency of the corroborative evidence taken as a whole, to support submitting the rape charge to the jury. The question is not whether each corroborative fact can independently support the fact of rape in order that it qualify for submission to the jury. The question is whether the fact

offered as corroboration is sufficiently susceptible of the inference to be drawn to qualify as relevant on the issue of corroboration. It is this distinction which appellant's argument overlooks. Accordingly, we submit that appellant's argument has been appropriately rejected by the sitting division.

Furthermore, we believe that the sitting division's determination of the issue sought to be reargued by appellant would have a minimal impact on the administration of justice in the District of Columbia. The sitting division merely applied a relevance test to the medical testimony corroborating Mrs. Clarke's testimony and held under the circumstances of this case that the medical testimony was relevant on the issue of corroboration.

For these reasons, we submit that the issue raised by appellant's argument does not warrant rehearing or en banc consideration.

II

Judge Robinson, writing for the sitting division, described the factual background on which appellant bases his second contention (Slip op. at 3):

> When appellant surrendered to the police, his trial attorney, who accompanied him, requested that she be informed as to when a lineup would be held, leaving her card for this purpose and stating her desire to be present. Appellant testified that he had apprehensions about the lineup and wanted his counsel there as a safeguard against the unfairness of any identification. But without notice to counsel and in her absence, appellant was placed in a lineup and

> identified by the rape complainant. And at trial the complainant not only again identified appellant in the courtroom, but also testified to her prior identification at the lineup.

Appellant argues that the nonretroactivity rule of Stovall v. Denno, 388 U.S. 293 (1967) should be excepted in cases such as this where counsel's request to be afforded an opportunity to be present at the accused's lineup was not honored. The sitting division rejected this argument stating (Slip op. at 4):

> We perceive some merit in this contention, and are ourselves concerned over the collapse, albeit unintended, of counsel's arrangements, but there are more powerful considerations on the other side. [Footnotes omitted].

The sitting division relied on the factors set forth in Stovall for not applying Wade [5/] and Gilbert [6/] retroactively and made the additional observation that, if the rule were limited to only those defendants whose counsel "sought affirmatively to arrange for attendance at the lineup," it would in "practical operation" . . . "benefit only those who were financially able to engage counsel at or very shortly after arrest" and thus "would discriminate between two classes of persons distinguishable only on the basis of wealth." Slip op. at 4-5.

Before turning to the merits, we note preliminarily that the sitting division's disposition of the issue sought to be reargued would appear to effect an extremely small number of cases, that such cases would be governed by the due process

5/ United States v. Wade, 388 U.S. 218 (1967).

6/ Gilbert v. California, 388 U.S. 263 (1967).

requirements of Stovall, and that the issue as applied to the conduct of present lineups is purely academic in view of Wade and Gilbert. For these reasons, we believe the issue sought to be reargued lacks sufficient moment to warrant en banc consideration.

We turn now to the merits. In attacking the sitting division's disposition of this issue, appellant relies in part on Escobedo v. Illinois, 378 U.S. 478 (1964). To be sure, in Escobedo the Court, in holding Escobedo's statements inadmissible, relied inter alia on Escobedo's request during interrogation to consult with counsel, a request which was not honored. Id. at 491. But Escobedo did not establish that every denial of a request for counsel at any stage of the prosecution impinges upon a constitutional right. Indeed, the Court in Escobedo refused to overrule Crooker v. California, 357 U.S. 433 (1958),[7/] indicating at the very least that, if Escobedo applied to a request made at a stage during which the privilege against self-incrimination is not endangered, Crooker requires consideration "of the sum total of the circumstances." Escobedo v. Illinois, supra at 491-92; see Gilbert v. United States, 366 F.2d 923, 935-40 (9th Cir. 1966) cert. denied, 388 U.S. 922 (1967) (where the court rejected the

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7/ In Crooker, the Supreme Court refused to formulate an absolute rule that once a person is taken into custody it is an infringement of a constitutional right not to honor a request to contact counsel without regard to the circumstances of the case.

very argument advanced here). There are of course significant differences between this case and Escobedo. Here the stage of the prosecution was the lineup. In Escobedo it was the interrogation process. Here it cannot be said that had appellant's counsel been present Mrs. Clarke would not have been able to identify appellant.[7a/] In Escobedo, counsel's absence, it was assumed, contributed to Escobedo's incriminating statement.[8/] Id. at 485-488. These differences are not mere factual distinctions but are legally critical for each bears on the possibility of prejudice resulting from the procedure challenged and hence its ultimate fairness.[9/] They are, we submit, fatal to appellant's reliance on Escobedo.

Moreover, we think the Supreme Court in Stovall impliedly rejected the argument advanced by appellant. In Gilbert v. United States, 366 F.2d 923, 934-35 (9th Cir. 1966), cert. denied,

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7a/ As we show infra, Mrs. Clarke observed appellant from close range for approximately 30 minutes during the appellant's criminal escapade in Mrs. Wilson's house. The lineup at which she identified appellant was held three weeks later. The lineup is not challenged on due process grounds and, as the sitting division noted, the record does not suggest that it was conducted contrary to the teaching of Stovall.

8/ We note also that here the failure to honor counsel's request was unintentional, while in Escobedo the authorities deliberately refused to allow Escobedo to consult with his attorney. Escobedo v. Illinois, supra at 480-82.

9/ As the Court noted in Stovall v. Denno, supra at 299:

> [I]t may confidently be assumed that confrontations for identification can be and often have been conducted in the absence of counsel with scrupulous fairness and without prejudice to the accused at trial.

As we show infra, this is a case in which this assumption is supported by the record.

388 U.S. 922 (1967), the Ninth Circuit considered the admissibility of identification testimony stemming from a lineup in which Gilbert was placed after he retained counsel and after his request for counsel's presence was not honored.[10/] The lineup described in Gilbert v. United States, supra, is the same lineup that was the subject of controversy in Gilbert v. California, 388 U.S. 263, 270 (1967). Because the record in Gilbert v. California, supra, did not elaborate on the manner in which Gilbert's lineup was conducted, the Supreme Court looked to the opinion of the Ninth Circuit for enlightenment and indeed quoted extensively from it. Gilbert v. California, supra at 270, n.2. The Supreme Court did not, however, mention that Gilbert had requested counsel before he was put in a lineup even though this fact was set out in the Ninth Circuit's opinion in the very sentence preceding the matter quoted by the Supreme Court. To be sure, in view of the rule formulated in Wade and Gilbert this fact was not crucial to the Court's decisions in those cases. But it could have easily served to distinguish Gilbert from Wade for the purpose of fashioning a rule on the question of retroactivity. In short, had the Court chosen to do so, it could have noted that Gilbert requested counsel, while Wade did not, and held that Gilbert should apply

10/ We note that in Gilbert v. United States, supra at 938-39, the majority (Judge Browning dissented on the lineup issue) discussed Escobedo at length and found nothing in it that required the exclusion of the identification testimony elicited at Gilbert's trial. And see United States ex rel. Bennett v. Myers, 381 F.2d 814 (3rd Cir. 1967) in which the Third Circuit, for the purpose of applying Wade and Gilbert prospectively, found no significance in the fact that the defendant's request for counsel's presence at the lineup was not honored.

to all lineups conducted since the date Escobedo was decided. But, for the purpose of holding its lineup decisions applicable to future lineups only, the Court treated Wade and Gilbert together finding no discernible difference between the two. Stovall v. Denno, 388 U.S. 293, 300 (1967).

We do not think it can be said that when the Court considered the question of retroactivity in Stovall that its attention was not drawn to the fact that Gilbert requested counsel. Wade, Gilbert, and Stovall were decided on the same day and the prevailing opinion in each case was authored by the same justice. Furthermore, on the day Wade, Gilbert and Stovall were decided, certiorari was denied from the Ninth Circuit's decision. Gilbert v. United States, 388 U.S. 922 (1967). In short, we think the omission of the fact that Gilbert requested counsel from the Court's opinion in Gilbert together with the Court's treatment of Wade and Gilbert in Stovall indicates that for purposes of fashioning a rule of non-retroactivity the Court viewed Gilbert's request for counsel as inconsequential.

This, we submit, disposes of appellant's argument that counsel's requested presence in this case warrants an exception to the non-retroactivity rule of Stovall. We do not suggest, and we do not read the sitting division's opinion to so hold, that a refusal to honor a request for counsel's presence at a stage of the prosecution to which the right to counsel has not

attached can never, under any circumstances, be a denial of a constitutional right. But this is not such a case. Appellant does not point to any special circumstances warranting a departure from the ordinary rule, and we find none.

This is not a case in which the record is barren of testimony bearing on the reliability of Mrs. Clarke's identification testimony and the manner in which the lineup was conducted.[11/] Mrs. Clarke attended two lineups, one on July 4, 1965, and the other on July 7, 1965 (Tr. 63-64). Mr. Jennings, along with Mrs. Clarke, attended the July 7th lineup (Tr. 28, 110-111). Appellant was not in the lineup of July 4th but was in the lineup of July 7th (Tr. 107-108). Mrs. Clarke identified appellant in the July 7th lineup; a lineup held approximately three weeks after the offense (Tr. 65-66).[12/] Mr. Jennings was unable to identify

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11/ The sitting division observed "that appellant makes no claim that the lineup procedure was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law' . . . and the record does not suggest that it was." Slip op. at 4, fn. 10.

12/ At the preliminary hearing Mrs. Clarke mistakenly said she identified appellant in the July 4th lineup but later in the course of the hearing corrected herself as to the date (Tr. 65-66, 76).

appellant either in the July 7th lineup or in court (Tr. 26).[13/]

Mrs. Clarke described her opportunity to observe appellant in the following testimony (Tr. 59-60):

> Q: Mrs. Clarke, approximately how long were you in the presence of the defendant in this case on June 14th in Mrs. Wilson's home?
>
> A: Well, it seemed like forever, but I suspect it was something like a half an hour.
>
> Q: And during that time, did you have an opportunity to get a good observation of him?
>
> A: I looked directly at him and at one point, the second time he was assaulting me, he said, "Turn your face away from me."
>
> I looked directly at him. I will never forget his face. In fact, I had a chance to see him when I went in. He was tying Mrs. Wilson up. He was looking this way (indicating) and didn't see me come in. When he looked up, he was surprised. He said, "How come you come over here? Did you hear her?" He said, "I can't shut her up."

13/ Mr. Jennings told the police officers who responded to Mrs. Wilson's residence that he thought he would be able to identify the intruder if he saw him again (Tr. 25-26). He said, "I said I could, but I couldn't because I went down to the lineup and I . . ." (Tr. 26). And later he completed the phrase when asked, "And you did not identify anyone, did you?" and he answered, "No sir" (Tr. 26).

He testified that he was unable to get a good look at the intruder because he saw him as he (Mr. Jennings) came out of the sunlight into a dimly lighted living room (Tr. 26, 33). He further testified that the intruder, upon greeting him at the door, jumped to his rear, put a gun in his back, and told him not to look around (Tr. 18).

> I said, Yes, I heard her. I thought she was hurt."
>
> Q: Mrs. Clarke, is there any doubt in your mind as to whether or not the defendant Ernest Borum is the same man who did to you just what you have testified to his Honor and these ladies and gentlemen of the jury?
>
> A: There is no doubt . . .

The manner in which the lineup was conducted was described by Detective Wolfgang. He said appellant was placed in a lineup which was held in the "Rollcall Room during the rollcall of all detectives" (Tr. 110). Appellant's lineup "was conducted in the course of . . . the . . . routine of the various men coming through, the morning of July 7" (Tr. 110). Although he described the routine lineup procedure used in the Rollcall Room, he did not specifically elaborate on the circumstances surrounding Mrs. Clarke's identification (Tr. 114). We think it is clear, however, from the fact that Mr. Jennings was unable to identify appellant that the circumstances surrounding Mrs. Clarke's identification were unimpeachable.

There are other reasons why we believe rehearing is not warranted. Here defense counsel made no effort to exclude Mrs. Clarke's in-court identification of appellant on the ground that it was tainted by an alleged unlawful out-of-court identification (Tr. 37-38, 60). Compare United States v. Wade, 388 U.S. 218, 220 (1967) (motion to strike in-court identifications on the ground that the conduct of the lineup violated Wade's Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel); Gilbert v. California, 388 U.S. 263, 271 (1967) (motion to strike witness' in-court identification on the ground that the witness identified Gilbert at the pre-trial lineup conducted in absence of counsel in violation of the Sixth Amendment made applicable to the states by the Fourteenth Amendment); Escobedo v. Illinois, 378 U.S. 478, 483 (1964) (motion made before and during trial to suppress incriminating statement); see Smith v. United States, 119 U.S. App. D.C. 119, 340 F.2d 797 (1964); Williams v. United States, 120 U.S. App. D.C. 244, 247, 345 F.2d 733, 736 (1965); Gilbert v. United States, 366 F.2d 923, 934-35 (9th Cir. 1966), cert. denied, 388 U.S. 922 (1967). Furthermore, it was defense counsel, and not the prosecutor, who first elicited testimony from Mrs. Clarke that she identified appellant in a lineup (Tr. 63-64). Indeed, because of the chronology of events at trial, it seems clear that the prosecutor when he adduced Mrs. Clarke's in-court identification of appellant, was not alerted to the fact that the police did not comply with

counsel's request to be notified as to when appellant would be placed in a lineup so that she could attend.

In short, this is not a case in which the issue presented on appeal was submitted to the trial court. Nor is this a case in which the failure to raise the issue leaves unanswered a question the resolution of which might indicate that the jury rested its verdict on unreliable testimony.

CONCLUSION

WHEREFORE, it is respectfully submitted that appellant's petition for rehearing or, in the alternative, for rehearing en banc be denied.

/s/ DAVID G. BRESS
DAVID G. BRESS,
United States Attorney

/s/FRANK Q. NEBEKER
FRANK Q. NEBEKER,
Assistant United States Attorney

/s/JOEL M. FINKELSTEIN
JOEL M. FINKELSTEIN,
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Opposition has been mailed to attorney for appellant, Howard C. Westwood, Esquire, 701 Union Trust Building, 740 - 15th Street, N.W., Washington, D.C. 20005, this 1st day of April, 1968.

/s/ JOEL M. FINKELSTEIN
JOEL M. FINKELSTEIN,
Assistant United States Attorney

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Ernest S. Borum,

Appellant,

v.

United States of America,

Appellee.

No. 20,270

REPLY TO OPPOSITION TO PETITION FOR REHEARING

This reply deals with the two issues raised in the Petition for Rehearing and the Government's Opposition to that petition and with a third issue, not previously raised, which is based on a recent Supreme Court decision.

I

On the issue as to the corroboration of rape to be found in evidence that a married woman, living with her husband, had had sexual intercourse within a period of 72 hours of the alleged rape, the Government's Opposition argues that that evidence is corroborative merely because it is relevant.

This, we submit, is too wooden and dangerous a rule.

It is questionable whether, in a case of rape, it is relevant that there were spermatozoa in a married woman's vagina in the late morning. Cf. Anonymous v. Anonymous, 150 N.Y.S.2d 344, 348 (2d Dept. 1956). But even if it be relevant, it is

impermissible that a jury be instructed, as here, in a way that allowed it to treat that single item of proof as adequate corroboration of the woman's charge of rape. Even in a civil case mere relevance does not establish sufficiency of proof; the more so is this true in a criminal case.

It may be that, in a rape case, the corroborative evidence need not independently establish the charge. Rather it is called for to give independent assurance that the prosecutrix was telling the truth. But if a jury is to be permitted to treat any item of the evidence as sufficient corroboration -- as did the highly generalized and rather jumbled instruction in this case -- then surely that item must be something more than a wholly neutral fact. The presence of spermatozoa is at most neutral; indeed it is more likely to be accounted for by the normal incident of a married woman's marriage than by rape. (This is equally true of the spermatozoa on the woman's panties; there was no blood, Transcript, p. 117; the spermatozoa could have been drip.)

The Government -- like the opinion of the division -- tries to escape the force of these considerations by the further suggestion that the presence of spermatozoa was only one in a number of items of evidence that, taken together, could be deemed corroborative. Just what this means is unclear. But the conclusive answer to the point is that the jury

in this case, under the instruction given it, could have taken this single item of evidence as sufficient corroboration. It defies reason to allow a jury to think that a married woman's charge of rape is corroborated by spermatozoa in her vagina in the morning.

II

On the issue of the frustration of counsel's effort to be present at the lineup, the Government does not reply to the contention presented in the Petition for Rehearing that the application of the tests set forth by the Supreme Court for determining the retroactive effect of constitutional rulings demonstrates that the rule of Wade v. United States, 388 U.S. 218 (1967), should be applied in this case. Nor does the Government suggest any interest of the state which would override the important need to prevent the police from frustrating reasonable efforts of counsel to protect her client.

Instead the Government bases its argument on an inference it draws from the failure of the Supreme Court to comment in the Stovall case*/ on a point not necessary to that decision. The Government argues as though the issue dealt with a refusal of an accused's request to have counsel at a lineup.

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*/ Stovall v. Denno, 388 U.S. 293 (1967).

As to that point it says that in the Gilbert case*/ the defendant had requested that counsel be present at the lineup and that, if a denial of such request would warrant retroactive application of the Wade/Gilbert ruling, the Supreme Court would have said as much in the Stovall decision. Opposition, pp. 11-13.

The Government's speculation as to what the Supreme Court meant by not having referred, in Stovall, to the fact that, allegedly, there had been a request for counsel in the Gilbert case is of little value. The Gilbert case was decided on a ground that made it irrelevant whether the accused there had requested counsel's presence. Hence for the Supreme Court to have gone further and to have commented, in Stovall, on the possible retroactive application of a possible ground for decision in Gilbert that was not in fact the ground for decision would have been sheer dictum and hardly in accord with the Supreme Court's practice.

Moreover, the record in the Gilbert case is not what the Government says it was. The Government refers to a sentence in the Gilbert habeas corpus case in the Court of Appeals immediately preceding a passage that the Supreme Court quoted in its Gilbert opinion. But that sentence is:

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*/ Gilbert v. California, 388 U.S. 263 (1967).

> "We assume, for the purpose of considering the matter, that, as Gilbert asserts, he informed the marshals that he did not want to attend and demanded counsel, and he was taken to the lineup anyway." (Emphasis added.) Gilbert v. United States, 366 F.2d 923, 935 (9th Cir. 1966). And see id., 951 n. 1.

Thus what the Government here asserts as the fact in Gilbert was a mere arguendo assumption by the Court of Appeals in the habeas corpus case. This makes the more far fetched the Government's suggestion that Stovall decided anything more than it said it decided.

But even more fundamentally, the Government is ducking the issue presented in this appeal. Here, as well as in Escobedo v. Illinois, 378 U.S. 478 (1964), counsel was affirmatively seeking to discharge counsel's function. It was not merely that the appellant wanted counsel present. Counsel herself was trying to protect her client, to exercise the proper, indeed the necessary, function of counsel. Identification was to be at the very heart of this case and counsel could quite reasonably have felt that, even apart from the appellant's concern about a rigged lineup, it was essential that she be present when the crucial lineup was conducted. She tried to be present. But the police frustrated her attempt. This was the grossest kind of interference on the part of the agencies of the State with the discharge of defense counsel's function.

Nor is it true that the frustration of counsel by the police was "unintended" as the Government says in footnote 8 at page 11 of its Opposition. The direct testimony of Detective Wolfgang on rebuttal at pp. 307-308 of the Transcript makes it reasonably clear that, in the eyes of the police, counsel was wasting her time in seeking to be present -- that her request was deliberately ignored.*/

* * *

The Government also makes the point that it was the defense, and not the prosecutor, that "first elicited testimony" about the identification at the lineup. Opposition, pp. 17-18. It is difficult to take this point seriously in view of the facts of this case reviewed at pp. 7-11 of our Memorandum Supplemental to Reply Brief for Appellant, dated June 23, 1967. As there pointed out, identification was crucial to the prosecution's case and in the prosecutor's opening statement to the jury he said:

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*/ The division's opinion refers to its concern "over the collapse, albeit unintended, of counsel's arrangements . . . ." We conceive "albeit unintended" to mean that the division was concerned even if the police had not intentionally frustrated counsel's arrangements -- as, indeed, it should be. But the truth of the matter is that the Transcript, at the pages we cite, very strongly indicates that the police <u>deliberately</u> failed to notify counsel of the lineup. Thus:

> "Q. Now, had she asked you to notify her at the time of the lineup, would you so have informed her?
>
> "A. No, sir." Transcript, p. 307.

> "He [the defendant] was positively identified in a lineup by Mrs. Clarke . . . ." (Emphasis added.) Transcript, p. 13.

Thereafter the lineup hardly needed to be referred to in the prosecutrix's direct testimony; obviously it had to come up in cross, and thereafter it received repeated emphasis by the prosecution.

* * *

One point made by the Government, however, is probably correct. Its Opposition states that the issue here presented " would appear to effect [sic] an extremely small number of cases . . .." Opposition, p. 9.

This statement follows, and seemingly is intended to draw a conclusion from, a quotation from the opinion of the division suggesting that a ruling in the appellant's favor would "benefit only those who were financially able to engage counsel . . .." In this suggestion, of course, the division was factually incorrect. At least since the inauguration of the Neighborhood Legal Services Project at the beginning of 1965 there has been available an agency to furnish counsel to the indigent at the so-called arrest stage (though limitation of resources has greatly limited the Project's activity in this area).*/ Nor is it true that the

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*/ Moreover, while the Legal Aid Agency at one time at least may have adhered to a restrictive reading of its statute seeming to cast doubt on the availability of its service at the arrest stage, in its actual operation it is by no means clear that it has been so blinded to reality as that reading would suggest.

indigent has never been able to find counsel at the arrest stage in this jurisdiction; with the amount of unorganized "legal aid" in this community -- especially by Negro lawyers -- the likelihood is that a lawyer has entered a case at that stage on a no-fee basis more often than the division's opinion appears to assume. In any event, as we pointed out in our Petition for Rehearing, the division was simply mistaken in its suggestion that a decision favoring the appellant would discriminate against the poor. Petition, pp. 10-11.

But it very probably is true, as the Government suggests, that a decision in appellant's favor here would affect few situations that have arisen in the past. The reason is found in Detective Wolfgang's testimony in this case. He testified that a request by counsel to be present at a lineup had been "unusual." Transcript, p. 307.

Thus a decision in favor of the appellant on the issue tendered would threaten no jail-delivery. The facts are unusual.

But that does not lessen the importance of the case. Much of the law's growth has come from the unusual case. Some of this Court's most pregnant opinions, no less in the criminal than in the civil field, are rendered in cases presenting unusual situations. And in this instance, however unusual it may have been before Wade and Gilbert for counsel to have tried to attend a lineup -- a relative

rarity hardly surprising in view of the police attitude disclosed in Detective Wolfgang's testimony, Transcript pp. 307-308 -- the legal principle involved is of tremendous significance. Even if a decision in appellant's favor were to affect not a single other case that has arisen heretofore it would affirm and give needed strength to a right of the bar that is absolutely essential to the health of our society. For it must be made unmistakably clear that when a man is in custody his counsel shall be free to take every reasonable step in that man's behalf with neither interference from nor frustration by the authorities. Quite apart from Wade and Gilbert, it should be obvious enough in this nation's capital city that where identification is likely to be all important diligent counsel, seeking to be present at a critical lineup without the slightest inconvenience to the authorities, cannot be barred by the police.

III

Counsel feels a responsibility to invite to the Court's attention a point not heretofore made in this case; we are prompted by the Supreme Court's very recent invalidation of the death penalty provision of the Federal Kidnapping Act. United States v. Jackson, 36 U.S.L. Week 4277 (April 8, 1968). Plainly that decision means that the death penalty provision of the rape statute here involved is also invalid. Hence the submission to the jury in this case of the issue of death, as a penalty, was unconstitutionally invalid. (The Judge's charge specifically adverted to the death penalty,

advising the jury that it could determine, upon a finding of guilt, that the appellant should be put to death. Transcript, p. 412.)

The point to which we invite the Court's attention is that, though the death penalty was not imposed, submission of the case to the jury on a basis allowing it to impose that penalty was fatally prejudicial to the appellant. For, by feeling that it could exercise leniency to the extent of not imposing the death penalty, the jury may have been led to convict of rape, whereas had it known that there was no death penalty its discretion might have led it to convict only of assault with intent to commit rape, which has a less severe potential punishment. A closely analogous situation was involved in United States ex rel. Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965), cert. denied, 383 U.S. 913 (1966), and the court there held that there had been fatal prejudice. Id., 856-857, 864, 865-866. So here the appellant's rape conviction should be reversed.

Respectfully submitted,

HOWARD C. WESTWOOD
701 Union Trust Building
Washington, D. C. 20005

Attorney for Appellant
(By Appointment of this Court)

Of Counsel:

T. ROGNALD DANKMEYER, JR.

COVINGTON & BURLING

701 Union Trust Building
Washington, D. C. 20005

April 17, 1968

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of April, 1968, he has served the foregoing Reply on the United States Attorney by causing two copies thereof to be delivered to David G. Bress, Esq., United States Attorney, United States Courthouse, John Marshall Place, Washington, D. C.

HOWARD C. WESTWOOD
701 Union Trust Building
Washington, D. C. 20005